Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

IN RE: FOCUS MEDIA, INC.,
Debtor,

FOCUS MEDIA, INC.,
Petitioner,

vs.

NATIONAL BROADCASTING COMPANY, INC.;
ABC, INC.; PAXSON COMMUNICATIONS, INC.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

A. Whether a petition for involuntary bankruptcy under Section 303 of the United States Bankruptcy Code may be premised on a claim that is the subject of a bona fide dispute as to amount, where the dispute arises from the same transaction or occurrence as the claim on which the petition is predicated.

B. Whether one who transfers a claim to another, or acquires such a claim, for purposes of commencing an involuntary bankruptcy proceeding has standing to be a petitioning creditor in such a proceeding under Section 303 of the United States Bankruptcy Code.

PARTIES TO THE PROCEEDING

Petitioner Focus Media, Inc. is a California corporation, the stock of which is wholly owned by Thomas E. Rubin, an individual . Focus Media, Inc. has no parent corporation, nor does any corporation own more than 10% of its stock.

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PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The order of the United States Bankruptcy Court for the Central District of California (the "Bankruptcy Court") in *In re Focus Media, Inc.*, Case No. BK LA 00-38197 KM, granting summary judgment in part against Petitioner and finding as a matter of law that the claims on which Respondents' involuntary bankruptcy petition was predicated were not in bona fide dispute was entered on September 24, 2001 and is unreported (the "Bankruptcy Court's Summary Judgment Ruling")(App. B herein). The findings of fact and conclusions of law supporting the order for relief entered by the Bankruptcy Court in *In re Focus Media, Inc.*, Case No. BK LA 00-38197 KM, making Petitioner a debtor under Chapter 7 of the United States Bankruptcy Code (the "Order for Relief") were entered on December 14, 2001 and are unreported (App. D herein).

The Order affirming the Bankruptcy Court's rulings by the United States District Court for the Central District of California (the "District Court"), Case No. CV 01-1146 AHS, was entered on May 1, 2003 and is unreported (the "District Court Order")(App. E herein). The Opinion of the United States Court of Appeals for the Ninth Circuit affirming the District Court Order was entered on August 2, 2004, and is reported at 378 F.3d 916 (9th Cir. 2004) (the "Ninth Circuit Opinion")(App. A herein). The Order of the Ninth Circuit Court of Appeals denying Petitioner's Petition for Rehearing was entered on November 15, 2004 (App. F herein).

JURISDICTION

The judgment of the Court of Appeals (App. A herein) was entered on August 2, 2004, and its order denying Petitioner's Petition for Rehearing was entered on November 15, 2004. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. Section 1254(1).

STATUTORY PROVISIONS INVOLVED

The pertinent text of the following statutory provisions is set forth in Appendix G:

Bankruptcy Code Section 303, 11 U.S.C. § 303.

Federal Rule of Bankruptcy Procedure 1003.

STATEMENT OF THE CASE

A. Nature of the Action

This petition arises from an involuntary bankruptcy action pursuant to 11 U.S.C. § 303, over which the Bankruptcy Court had jurisdiction pursuant to 28 U.S.C. § 157. The matter concluded in the Bankruptcy Court with an Order for Relief making Petitioner Focus a debtor under Chapter 7 of the United States Bankruptcy Code. The case began, however, as a garden-variety breach of contract civil action. In March, 2000, Respondent National Broadcasting Company, Inc. sued Focus in the United States District Court for the

Central District of California over allegedly unpaid invoices in the amount of approximately $2 million. Focus mounted a vigorous defense. After losing an application for a pre-judgment writ of attachment because the amount of its claim was not ascertainable, as required by California law for an attachment to issue, NBC dismissed the federal court action and re-filed in state court. Focus filed a cross-complaint asserting claims for breach of contract and interference with contract. Raising the stakes, NBC then catapulted its contract dispute with Focus to the United States Bankruptcy Court in the guise of a petition for involuntary bankruptcy, seeking to make Focus a debtor under Chapter 7 of the Bankruptcy Code. Respondents ABC and Paxson Communications, Inc., an affiliate of NBC, were persuaded to join in the petition, thus ostensibly comprising the necessary three petitioning creditors for an involuntary bankruptcy petition against Focus.

As an involuntary bankruptcy proceeding is the corporate equivalent of a capital murder trial, raising the specter of a corporate death sentence for a business, the Congress legislated certain protections for purported debtors subjected to the harsh prospect of being forced into bankruptcy by their creditors. Specifically, Section 303 of the United States Bankruptcy Code requires that to prevail on an involuntary petition against an entity with more than twelve creditors, the petitioners must prove that:

> (1) There are at least three qualified petitioning creditors, each of which is the holder of a claim *that is not the subject of a bona fide dispute;*
>
> (2) The claims of the petitioning creditors aggregate at least $10,775.00; and,
>
> (3) The purported debtor is generally not paying its

> debts as they become due, unless those debts *are the subject of a bona fide dispute.*

11 U.S.C. § 303(b) and (h)(emphasis added). *See* Appendix G-1.

Moreover, under Federal Rule of Bankruptcy Procedure 1003, to "qualify" as a petitioning creditor under Section 303 of the Bankruptcy Code, a petitioner must not have either transferred or acquired a claim for the purpose of commencing an involuntary bankruptcy proceeding. *See* Appendix G-2.

These minimal protections, requiring petitioners to prove the untainted nature of their claims and to possess standing to sue, are all that stand between a business entity forced into defending against an involuntary bankruptcy and a ruling ending its corporate existence.

Here, none of the protections to which Focus was entitled under the Bankruptcy Code and Rules of Procedure were afforded. First, there was not a sufficient number of petitioning creditors to maintain an involuntary bankruptcy against Focus. While ultimately eight entities purported to be petitioning creditors, Focus proved that at least six were disqualified for their *admitted* violations of Federal Rule of Bankruptcy Procedure 1003, leaving less than the three petitioners required by Section 303.

Second, Focus was prevented from proving that it was generally paying its debts as they came due by the Bankruptcy Court's improper and punitive adjudication of this issue against Focus as a discovery sanction, without supporting evidence.[1]

---

[1] Focus does not appeal this issue, however.

Third, Focus presented substantial evidence that the claims that formed the purported basis for the petition were the subject of bona fide disputes. More importantly, the Respondents admitted that their claims were disputed *at least as to amount*. Nonetheless, despite Focus' evidence and the Respondents' admissions, the Bankruptcy Court ruled in response to Respondents' motion for summary judgment that there was not even sufficient evidence to warrant a trial on this issue, thus depriving Focus of its day in court on a fundamental issue in the case.

Coupling the summary judgment ruling with the discovery sanction that deprived Focus of the ability to demonstrate that it was generally paying its debts (other than those that were the subject of a bona fide dispute) as they came due, and the Bankruptcy Court's refusal to disqualify the petitioning creditors that admittedly violated Rule 1003, ultimately culminated in the Bankruptcy Court's Order for Relief.

This petition will focus only on the Bankruptcy Court's rulings that the claims that formed the basis of the involuntary petition were not the subject of a bona fide dispute and that the petitioning creditors all had standing to maintain the petition against Focus, despite that at least six of them admitted to having violated Bankruptcy Rule 1003.

B. Statement of Facts

Since the early 1980s, Focus was an independent media buying company that purchased media time, including "spot advertising", for clients from local radio and television stations and vendors of cable television. The vendors with whom Focus did business contracted to run the ads at specific times and on certain specific programs and to deliver a certain size demographic audience (*e.g.*, to reach a certain number of male viewers ages 40 through 49, for example). Focus also received the promise of its vendors that it would receive the best rates available to any customer of that vendor, referred to in the industry as a "best rates" contract.

Historically, Focus pre-paid open broadcaster invoices, subject to adjustment after Focus conducted a process called post-analysis and reconciliation. Post-analysis is an industry-wide practice that essentially involves determining whether or not the commercials actually ran at the times and on the programs ordered and whether the programs achieved the promised ratings, as measured by ratings agencies like A.C. Nielsen. In other words, the purpose of post-analysis is to determine whether the media buyer received what it ordered and paid for. Only after the post-analysis was complete, and Focus reconciled what was ordered against what was actually delivered, could Focus definitively determine the correct amount of its obligation to the broadcaster.

In fact, the post-analysis process frequently revealed that Focus' orders had been preempted, that ads had aired at the wrong time or on the wrong show, or that the promised demographic rating was not achieved. In these instances, the amount due the broadcaster would be substantially less than what was set forth on the invoice that Focus had pre-paid.

Thus, post-analysis sometimes revealed that Focus had overpaid the broadcaster and was entitled to a refund or credit.

Focus typically completed the post-analysis and reconciliation process between 90 to 180 days after Nielsen published its quarterly ratings. Upon completion, Focus would contact the broadcasters to negotiate compensation for discrepancies that had resulted in overpayments. Typically, compensation for such overpayments was in the form of cash, credit, or substitute or additional advertising spots (referred to in the industry as "make-goods"). In the event a discrepancy resulting in overpayment was found for an advertiser that no longer was a Focus client, however, Focus' policy was to accept only cash compensation for the overpayment.

The foregoing describes how Focus did business with broadcasters, including the Respondents, for over 20 years. In 1999, however, stations affiliated with NBC began making demands contrary to the long-standing course of dealing between the parties. It became apparent that the NBC owned and operated vendors were intent on breaching their respective agreements with Focus. The stations' various "activities" aimed at this goal culminated in a demand by NBC for allegedly unpaid invoices in excess of $2 million, even though the post-analysis for the invoices at issue had not yet been completed.

When Focus did not accede to NBC's demand, NBC sought to disrupt Focus' relationship with its clients, one of which was Sears, Roebuck & Co. Sears stopped paying Focus' invoices, and Sears and Focus sued each other in the Superior Court of Los Angeles, California.

On March 13, 2000, NBC, as assignee of claims from certain of its affiliates, sued Focus in the United States District Court for the Central District of California. NBC sought a pre-judgment writ of attachment under California law, which Focus defeated because the amount of the claim on which the attachment application was based was not "readily ascertainable" as required by California law. After defeating the attachment, Focus moved to dismiss the action. While the motion to dismiss was pending, NBC voluntarily dismissed the action and filed a new action against Focus in state court.

In response to the state court action, Focus filed a cross-complaint against NBC for breach of contract, including NBC's violation of the parties' "best rates" agreement, which Focus intended to prove had resulted in significant overcharges to Focus over many years. Focus also asserted a claim for tortious interference with Focus' contractual and economic relationships, including its relationship with Sears. Focus' answer asserted a number of affirmative defenses based upon damages that Focus sustained as a result of NBC's breach of its contract with Focus and disruption of Focus' customer relationships.

C. Procedural History

Not satisfied with the progress of the state court litigation, NBC decided to escalate its dispute with Focus. It persuaded ABC and Paxson to join NBC in a petition seeking to force Focus into involuntary bankruptcy. The involuntary petition was filed on October 6, 2000. ABC asserted a claim against Focus for just over $1.5 million on behalf of certain separately-incorporated television stations in violation of Federal Rule of Bankruptcy Procedure 1003 because ABC

subsequently admitted in sworn testimony that the separate entities transferred their claims to ABC for the purpose of commencing the involuntary proceeding.[2]

On October 26, 2000, twenty days after the petition was filed, and before Focus had even filed a response, non-party Sears made an "emergency" motion to the Bankruptcy Court for relief from the automatic stay imposed by Bankruptcy Code Section 362. The ground for the motion was that Sears wanted to have the automatic stay lifted so that the Los Angeles Superior Court could enforce an injunction that Sears had obtained against Focus in the state court litigation. *Strictly in the alternative, and in the event that the Bankruptcy Court would not lift the automatic stay*, Sears moved for the appointment of an interim trustee for Focus. At the hearing, which was conducted on less than 24-hours' notice to Focus and its counsel, Focus agreed to accept the lifting of the automatic stay as to the state court litigation.

Although Focus' proposed stipulation would seem to have dispensed with the need for the Bankruptcy Court even to reach Sears' proposed alternative motion, the Bankruptcy Court not only granted the motion for relief from stay, but also granted the alternative motion and appointed an interim trustee to take control of Focus' assets during the pendency of the involuntary bankruptcy. Under the Bankruptcy Code, the purpose of an interim trustee is to preserve the assets of the

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[2] The specific testimony by ABC's in-house counsel was to the effect that the separate entities transferred their claims to ABC for purposes of having ABC collect them. As the only collection vehicle that ABC ever pursued against Focus was the involuntary bankruptcy petition, it can fairly be inferred from this undisputed testimony that the transfers were for the purpose of having ABC commence the involuntary bankruptcy proceeding. The lower courts disagreed with this interpretation, however.

estate during the pendency of the involuntary petition. *See* Bankruptcy Code §303(g). Nonetheless, on February 9, 2001, the Bankruptcy Court granted the interim trustee's motion for permission to auction off all of Focus' assets, including its computers and business records that Focus needed to defend against the involuntary petition.

In the meantime, Focus filed a motion for summary judgment against NBC on the ground that NBC's claim, previously the subject of litigation in both state and federal courts, was the subject of a bona fide dispute. Focus argued that the existence of the dispute disqualified NBC as a petitioning creditor, leaving only two of the statutorily-mandated three petitioning creditors and requiring that the petition be dismissed. On the eve of the hearing, Respondents purported to circumvent this roadblock by having five of the ABC-affiliated stations simply re-file claims on their own behalf so that NBC could argue in opposition to Focus' motion that even if *its* claim was subject to a bona fide dispute, more than three petitioning creditors remained. As a result of the joinders, the Bankruptcy Court denied Focus' motion for dismissal of the petition.

On February 7, 2001, Respondents filed a motion with the Bankruptcy Court to compel Focus to produce certain documents over which the interim trustee had control. In response to a series of rulings by the Bankruptcy Court ordering Focus (but not the trustee) to produce documents under the threat of sanctions, Focus' counsel made several separate productions of the trustee's documents. Nonetheless, the Bankruptcy Court ruled that certain "essential" documents were not produced and punished Focus (but not the trustee) by finding as a matter of law that Focus was not generally paying its debts as they came due. The Bankruptcy Court's order entering this "terminating sanction" was made on June 5, 2001.

In this fashion, one of the two key elements of the case was adjudicated against Focus in the absence of any evidence to support the Bankruptcy Court's finding.

On August 2, 2001, Respondents filed a motion for summary judgment seeking a ruling that the claims on which the involuntary petition was predicated were not in bona fide dispute. Despite a wealth of evidence that Focus proferred demonstrating the existence of a bona fide dispute, the Bankruptcy Court ruled as a matter of law that no such dispute existed.

The Bankruptcy Court's discovery sanction and Summary Judgment Ruling left only a single issue remaining for an evidentiary hearing. The Bankruptcy Court conducted that hearing on October 18 and 19, 2001 and ruled against Focus. Thereafter, the Bankruptcy Court entered its Order for Relief on October 22, 2001.

On November 2, 2001, Petitioner filed its notice of appeal from the Order for Relief to the United States District Court for the Central District of California. On May 1, 2003, the District Court entered its order affirming the Bankruptcy Court's rulings that culminated in the Order for Relief.

On May 12, 2003, Petitioner filed its notice of appeal of the District Court's Order to the Ninth Circuit Court of Appeals. The Ninth Circuit Opinion affirming the District Court's Order was entered on August 2, 2004.

REASONS FOR GRANTING THE WRIT

I. THE NINTH CIRCUIT'S OPINION IGNORES THE CONGRESSIONAL INTENT BEHIND BANKRUPTCY CODE SECTION 303.

Section 303 of the United States Bankruptcy Code provides that an involuntary bankruptcy petition may not be predicated on any claim that is in bona fide dispute. In enacting the amendment to Section 303 that added the bona fide dispute requirement, the Congress specifically noted that a bona fide dispute as to *either liability or amount* would bar an involuntary bankruptcy petition:

> Under my amendment the original filing of an involuntary bankruptcy petition could not be based on debts that are the subject of a good faith dispute between the debtor and his or her creditors. In the same vein, the granting of an order of relief could not be premised solely on the failure of a debtor to pay debts that were legitimately contested as to liability *or amount*.

130 Congressional Record S7618, June 19, 1984, remarks of Senator Baucus. (Emphasis added.)

Sound reasons exist for the Congress to have disqualified claims that are disputed in amount from serving as the basis for an involuntary bankruptcy petition. The potential for abuse of the involuntary bankruptcy petition is strong, as even the Ninth Circuit has observed in prior cases: The purpose for the bona fide dispute requirement is "to prevent creditors from using the

threat of an involuntary petition to bully an alleged debtor into settling a speculative or validly disputed debt." *Chicago Title Insurance Co. v. Seko Investment, Inc. (In re Seko Investment, Inc.)*, 156 F.3d 1005, 1008 (9th Cir. 1998). *See also, Key Mechanical, Inc. v. BDC56 LLC (In re BDC56 LLC)*, 330 F.3d 111, 117-18 (2d Cir. 2003), quoting *In re Lough*, 57 B.R. 993, 997 (Bankr. E.D. Mich. 1986)("Congress plainly did not intend to require a debtor to pay a legitimately disputed debt simply to avoid the stigma of bankruptcy.") Yet the very evil that the statutory protection is meant to avoid is allowed to proliferate unless a legitimate dispute as to the amount of a claim qualifies as a bona fide dispute under the statute.

For example, a creditor owed the relatively modest sum of $10,000, an amount that does not even meet the statutory threshold for filing an involuntary petition, could claim that it is owed many times that amount, knowing that the mere threat of bankruptcy likely would extort payment of far in excess what is actually owed. Realizing the potential for abuse of the involuntary bankruptcy procedure, the Congress specifically provided that it intended that the claims on which an involuntary petition is predicated be undisputed as to *either liability or amount.*

Here, Petitioner demonstrated that *at a minimum* there was a dispute over the amount of the claims on which the petition was based. Focus demonstrated that the claims were subject to a process of post-analysis and reconciliation that the bankruptcy filing and the appointment of an interim trustee had disrupted and prevented. Focus proved that post-analysis and reconciliation were industry-wide practices and were part of the long course of dealing between Focus and Respondents. It further adduced substantial evidence that Respondents had been overcharging Focus for many years and that Focus was entitled to substantial credits based on Respondents' breach of

their "best rates" agreements with Focus. Using what little information it was able to reconstruct after the interim trustee sold off its computers and computerized databases, Focus conducted a partial post-analysis for a portion of the period in dispute and demonstrated that it had overpaid virtually all of the invoices that were the subject of that limited post-analysis.

Thus, the evidence overwhelmingly established that there was a dispute between Petitioner and Respondents as to the amount, if any, that was owed. Confirming this, Respondents eventually *admitted* that there was a dispute as to the amount owed. They argued, however, that a dispute as to amount does not qualify as a bona fide dispute under Section 303.

The Bankruptcy Court accepted Respondents' argument, holding that a dispute as to amount would have to reduce the claim to something below the statutory threshold before the claim would be disqualified. The Ninth Circuit agreed, holding that a dispute as to the amount of a claim "is relevant only if it takes the total debt below $10,775." (App. A-12.) In other words, the lower courts ruled that a claim effectively can be "split" into its disputed and undisputed portions, and if the undisputed portion is above the statutory minimum, that part of the claim still can qualify for bankruptcy under Section 303.

Yet this holding fundamentally conflicts with Section 303's mandate that an involuntary bankruptcy petition cannot be maintained after it is determined that the claim on which it is premised is *disputed.* The mere existence of a dispute–provided that it has the appearance of legitimacy (hence the bona fide language that qualifies the word "dispute")–disqualifies the petition. Under the statutory scheme, disputed claims belong in civil, not bankruptcy, court. Therefore, once the bankruptcy court has determined that an apparently legitimate dispute exists, its inquiry is at an end. Even the

Ninth Circuit in prior opinions has recognized that disputed claims must not be *resolved* by the bankruptcy court:

> A bankruptcy court [in deciding whether or not a bona fide dispute is present] is not asked to evaluate the potential outcome of a dispute, but merely to determine *whether there are facts that give rise to a legitimate disagreement over whether money is owed, or, in certain cases, how much.*

Liberty Tool & Manufacturing v. Vortex Fishing Systems, Inc. (In re Vortex Fishing Systems), 277 F.3d 1057, 1064 (9th Cir. 2002). *Accord, In re Busick,* 831 F.2d 745, 750 (7th Cir. 1987); *In re Norris*, 138 B.R. 437 (Bankr. W.D. La. 1995); *In re Prisuta,* 121 B.R. 474, 476 (Bankr. W.D. Pa. 1990).

In other words, the Ninth Circuit in the *Vortex* case correctly held that the bankruptcy court is not to decide "how much" is owed in the event of a dispute as to amount, but merely whether there is a *legitimate disagreement* over "how much" is owed. A finding of such a "disagreement" with respect to the amount *ends the inquiry under Section 303*. To parse through the claim to decide whether a part of it is legitimately owed, after netting out potential defenses and counterclaims, requires the bankruptcy court to determine the dispute itself, something that Section 303 prohibits the court from doing.

Upon determining that a dispute as to the amount of the claim exists, provided that the dispute appears bona fide, the bankruptcy court loses jurisdiction over the matter. To go further and attempt to *decide* the dispute denies the purported debtor one of the few statutory protections to which he or she is entitled under Section 303. That protection essentially guarantees that the debtor with a legitimate dispute as to a

claim will have the dispute decided not in bankruptcy, but in civil court, with all of the attendant protections that implies, including the right to a trial by jury.

II. THE NINTH CIRCUIT'S OPINION IGNORES THE STATUTORY MANDATE THAT THE BURDEN OF PROOF IS ON THE PETITIONING CREDITORS.

As set forth above, Section 303 of the Bankruptcy Code requires petitioning creditors on an involuntary bankruptcy petition to prove that their claims are not in bona fide dispute. All of the Circuit Courts of Appeal that have considered the issue, including the Ninth, have consistently held that the burden of proving the *absence* of a bona fide dispute is on the petitioning creditors. *See In re Vortex*, 277 F.3d at 1064 ("We have previously held that the burden is on the petitioning creditors to show that no bona fide dispute exists."), citing *In re Rubin*, 769 F.2d 611, 615 (9th Cir. 1985). *See also, Subway Equipment Leasing Corp. v. Sims (In re Sims)*, 994 F.2d 210, 221 (5th Cir. 1993); *Rimmell v. Mark Twain Bank (In re Rimmell)*, 946 F.2d 1363, 1365 (8th Cir. 1991)(petitioning creditors have burden of establishing a prima facie case as to the absence of a bona fide dispute); *Bartmann v. Maverick Tube Corp. (In re Bartmann)*, 853 F.2d 1540, 1544 (10th Cir. 1988); *In re Reid*, 773 F.2d 945, 946 (7th Cir. 1985). It would indeed be inconsistent with the plain language of the statute to place the burden on the respondent to prove the *existence* of a bona fide dispute in order to avoid bankruptcy.

As the Second Circuit Court of Appeals has held:

> One of the requirements to bringing [an involuntary] petition is that the petitioning creditors' claims are free from bona fide dispute. Any creditor wishing to invoke the bankruptcy court's jurisdiction in an involuntary case should be required to demonstrate at the earliest practicable point that its petition satisfies this requirement. Otherwise, creditors could, on the basis of relatively untested claims, haul a solvent debtor with whom they have legitimate disputes into bankruptcy court and force it to defend an involuntary proceeding while the bankruptcy court leaves for a later merits determination whether the debtor is even properly before it.

Key Mechanical, Inc. v. BDC56 LLC (In re BDC56 LLC), 330 F.3d 111, 118-19 (2d Cir. 2003)

Yet, the holdings of the courts below *effectively* placed the burden on Focus to demonstrate the existence of a dispute. The Ninth Circuit held that "the bankruptcy court properly concluded that Focus had not established any *actual dispute* as to the amounts owed the petitioning creditors." App. A-12. Rather, the court found that Focus demonstrated only a "potential" dispute. *Id.*

The Ninth Circuit's holding is irreconcilable with Section 303. The above quote demonstrates that the Ninth Circuit improperly allocated to Focus the burden of proving the existence of a bona fide dispute, instead of holding Respondents to their burden of proving its absence, contrary to the statutory mandate. Further, the court's finding that Focus demonstrated a "potential" that the dispute might be resolved in Focus' favor virtually mandated dismissal of the petition. A

dispute necessarily deals in the realm of the potential; until it is resolved, the "potential" exists that it will be resolved favorably or unfavorably to one of the parties involved. However, the "potential" that the resolution will be one way or the other in no way changes the fact that a dispute exists.

The Ninth Circuit's Opinion herein is inconsistent with its own precedent in *In re Vortex*, where the court properly found that various affirmative defenses that the respondent had asserted in pre-existing litigation, including offset, waiver and estoppel, raised the specter of a bona fide dispute. In that case the Ninth Circuit upheld the dismissal of the involuntary bankruptcy petition based upon a single, self-serving letter from the respondent to the petitioning creditors, which the court found lent some credence to the affirmative defenses. Referring to that letter as the basis for dismissing the petition, the Ninth Circuit held:

> [T]his evidence establishes that the validity of [petitioning creditor's] claim is subject to a bona fide dispute because [petitioning creditor's] alleged breach of [another contract] *may have resulted* in its waiver of its right to collect on the open account. Additionally, [petitioning creditor] *may have* rendered impossible Debtor's ability to make payments on the open account.

In re Vortex, 277 F.3d at 1067, n.3 (emphasis added).

Contrary to its holding in *In re Vortex*, here the Ninth Circuit disregarded Focus' evidence and claims that could have resulted in offset of the Respondents' claims. Nonetheless, Focus' evidence was far stronger than the evidence held to establish the existence of a bona fide dispute in *Vortex*.

III. THE NINTH CIRCUIT'S OPINION CONFLICTS WITH SECOND CIRCUIT PRECEDENT.

The Ninth Circuit Opinion herein conflicts with the Second Circuit's decision in *Key Mechanical, Inc. v. BDC56 LLC (In re BDC56 LLC)*, 330 F.3d 111 (2d Cir. 2003). There, the Second Circuit upheld the dismissal of an involuntary bankruptcy petition because the petitioning creditor's claim was the subject of a bona fide dispute. The petitioning creditor, a contractor, claimed it was owed over $230,000 for HVAC work performed for the purported debtor. The debtor-respondent contended that the petitioning creditor had failed to complete the required work and that deficiencies in the petitioning creditor's performance had caused the debtor to incur damages of its own, offsetting any amounts owed the petitioner.

Affirming the bankruptcy court's dismissal, the Second Circuit rejected the petitioning creditor's argument that even after allowing for appropriate offsets in the debtor's favor, the sum of $35,000 (in excess of the statutory minimum under Section 303) still was owed: "there has been no determination that this amount is in fact owed." 330 F.3d at 120. Rather, the court upheld the dismissal of the petition based on the mere allegation that the debtor's "direct and indirect" damages *could* serve completely to offset the petitioning creditor's claim:

> Here BDC alleges that Key's default caused *undetermined* damages *likely* to exceed any amount Key could recover. Since BDC's claim for offset arises out of the same transaction and related to Key's claim, and, *if valid*, would extinguish the claim, the Bankruptcy Court correctly concluded that a bona fide

dispute exists.

Id. at 120. (Emphasis added.)

The Second Circuit in *Key* correctly acknowledged that the mere potential that the purported debtor would be able to establish claims and/or defenses that *could* offset the petitioning creditor's claim was sufficient to raise a bona fide dispute. It did not attempt to determine whether or not the debtor's claim of offset was valid, or the amount of the petitioning creditor's claim that would thereby be offset. Rather, the court properly ruled that given that there was a *possibility* that the purported debtor would be able to prove the validity of its claims and a *possibility* that those claims *might* offset the claim of the petitioning creditor, the dismissal of the petition was required.

The Ninth Circuit Opinion herein conflicts with the Second Circuit's holding in *Key* because the Ninth Circuit would hold the respondent in an involuntary bankruptcy to a completely different and inappropriately higher standard in order to obtain dismissal of the petition. Effectively, the Ninth Circuit requires a respondent to *prove* the validity of any affirmative defense or counterclaim relied upon to demonstrate the existence of a bona fide dispute. By contrast, the Second Circuit properly concluded that evidence suggesting that the respondent might be able to demonstrate the validity of its claim in another forum mandated dismissal of the petition.

Because the bankruptcy laws are of national application, and uniformity of application is essential, particularly in the area of involuntary bankruptcy, Focus respectfully submits that the potential conflict between the holdings of the Ninth and Second Circuits makes it important for the Court to hear this petition. Respondents should not be subjected to different burdens of proof depending upon the jurisdiction in which they

are hailed before the bankruptcy court. Moreover, the forum-shopping that will necessarily flow from the disparate standards applied in the Ninth and Second Circuits should not be tolerated.

IV. THE NINTH CIRCUIT'S OPINION DENIED FOCUS THE PROTECTIONS OF BANKRUPTCY RULE 1003.

Bankruptcy Rule 1003 provides in pertinent part: "An entity that has transferred or acquired a claim for the purpose of commencing a case for liquidation under chapter 7 or for reorganization under chapter 11 shall not be a qualified petitioner." Like the requirement that the claims on which an involuntary petition is predicated not be in bona fide dispute, the prohibition on transferred claims serving as the basis for an involuntary petition is a fundamental protection afforded to would-be debtors. Nonetheless, Focus was denied the benefit of this protection by the Bankruptcy Court's refusal to disqualify the petitioning creditors that admittedly violated Rule 1003, a ruling that was sustained on appeal by the Ninth Circuit.

The evidence below undisputedly showed that ABC *acquired* the claims of five of its subsidiaries for purposes of filing the involuntary bankruptcy petition and that those subsidiaries likewise *transferred* their claims to ABC for purposes of allowing ABC to commence the involuntary bankruptcy proceeding. Specifically, ABC's in-house attorney admitted under oath, and in unrefuted testimony, that the transfers occurred. Nonetheless, the bankruptcy court refused to disqualify either ABC or the transferors of the claims despite the plain language of Rule 1003, ruling that there was no

written evidence of the transfers, even though Rule 1003 does not require that a transfer be memorialized in any way in order for it to violate the Rule's proscriptions.

On appeal, the Ninth Circuit basically upheld the Bankruptcy Court's holding that no "legally valid" transfer or assignment had occurred, based upon the absence of any documentation of same. No explanation was given as to why a transfer, admitted by counsel for the transferee, would have to be documented in order to be valid. Moreover, no such requirement can properly be read into Rule 1003.

The Ninth Circuit also found that the trial testimony of ABC's in-house counsel was to the effect that the subsidiaries transferred their claims to ABC so that ABC could collect the debts represented by those claims, not specifically so that ABC could commence an involuntary bankruptcy proceeding. Yet, the evidence was undisputed that the only collection mechanism that ABC ever pursued against Focus was the involuntary bankruptcy petition. As such, the Court of Appeals' explanation appears to exalt form over substance. Given that Rule 1003 is for the protection of the purported debtor, it should not be construed or applied so as to deny its protections to the intended beneficiary. Rather, it should be reasonably construed in favor of Focus and doubts about its application resolved in Focus' favor.

CONCLUSION

This Court should grant certiorari to clarify that an involuntary bankruptcy petition cannot be predicated on claims that are disputed as to liability or amount in violation of Bankruptcy Code § 303 and further to ensure that respondents in involuntary bankruptcy are afforded all of the protections to which they are entitled under the law. Certiorari is also necessary to ensure uniform application and interpretation of the involuntary bankruptcy laws and to discourage forum-shopping.

DATED: February 11, 2005.

Respectfully submitted,

JULIE M. McCOY

LAW OFFICE OF JULIE M. McCOY

Attorney for Petitioner
FOCUS MEDIA, INC.

APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

In re: FOCUS MEDIA, INC., *Debtor,*	
FOCUS MEDIA, INC., *Appellant,* v. NATIONAL BROADCASTING COMPANY INC.; ABC INC.; PAXSON COMMUNICATIONS INC., *Appellees.*	No. 03-55808 D.C. No. CV-01-01146-AHS OPINION

Appeal from the United States District Court
for the Central District of California
Alicemarie H. Stotler, District Judge, Presiding

Argued and Submitted
June 10, 2004—Pasadena, California

Filed August 2, 2004

Before: T.G. Nelson, A. Wallace Tashima and
Raymond C. Fisher, Circuit Judges.

Opinion by Judge Fisher

COUNSEL

Julie M. McCoy, Newport Beach, California, for the appellant.

Bruce A. Wessel, Irell & Manella, LLP, Los Angeles, California, for the appellees.

OPINION

FISHER, Circuit Judge:

This appeal arises from an involuntary Chapter 7 bankruptcy petition filed by eight putative creditors of Focus Media, Inc. ("Focus"). These creditors consisted of appellees National Broadcasting Company, Inc. ("NBC"), ABC Inc. ("ABC") and Paxson Communications, Inc. ("Paxson"), as

well as five affiliates of ABC (collectively with appellees, "petitioning creditors"). Focus appeals the district court's order affirming the bankruptcy court's orders (1) granting the petitioning creditors' motion for summary judgment and (2) denying Focus' motions to disqualify the bankruptcy judge. Appellees contend that this appeal is moot and that, in any event, the bankruptcy and district courts correctly decided the merits.

We do not dismiss Focus' appeal as moot. However, because Focus did not present evidence that creates a triable issue of fact regarding the involuntary petition requirements of 11 U.S.C. § 303, and the bankruptcy judge did not abuse her discretion in deciding not to recuse herself, we affirm.

BACKGROUND

Focus was a media-buying company that placed commercial spots for its clients on television and radio stations. Its two major clients were Sears, Roebuck & Co. ("Sears") and Universal City Studios, Inc. ("Universal"), each of which paid Focus in advance for booking commercial time on various media outlets, such as the petitioning creditors. Focus, in turn, would pay the media outlets for the booked commercial spots.

Universal and Sears fired Focus in 1999 and 2000, respectively. Sears subsequently filed a civil suit against Focus in California superior court, alleging that funds it had paid Focus "were transferred for the specific purpose of Focus paying the Media Outlets on Sears' behalf." According to Sears, the funds had not in fact been used to pay the media. Thus, Sears sought a preliminary injunction against Focus, alleging that the money paid to Focus belonged to Sears and not Focus.[1] Focus, however, argued that it owed millions of dollars to the media for spots it had booked for Sears and others and thus

[1]Focus filed a cross-complaint against Sears, including claims of fraud and breach of contract.

should be permitted to keep the payments Sears had advanced to Focus. The superior court granted Sears a preliminary injunction on May 9, 2000, prohibiting Focus from distributing or transferring any of Sears' funds.

On October 6, 2000, NBC, ABC and Paxson filed an involuntary petition for Chapter 7 bankruptcy against Focus, pursuant to 11 U.S.C. § 303. Five ABC affiliates joined the petition in January 2001. The involuntary petition triggered an automatic stay of the state court proceedings under 11 U.S.C. § 362.

On October 24, 2000, Sears moved in the bankruptcy court for relief from the automatic stay, so that it could pursue its state court action. The next day, Sears filed an alternative motion for the appointment of an interim trustee. On October 27, the bankruptcy court granted the motion for an interim trustee.

The bankruptcy court proceedings were tense and hard-fought. On November 13, 2000, Focus moved to disqualify the bankruptcy judge, who heard the motion on December 27 and denied it on January 11, 2001. On July 18, 2001, Focus moved again to disqualify the bankruptcy judge, who, after a hearing, also denied this second motion on September 25. In addition to these two disqualification motions, Focus' chief financial officer also filed a judicial misconduct complaint against the bankruptcy judge with the Judicial Council of the Ninth Circuit.[2]

Meanwhile, on December 8, 2000, Focus filed a motion for summary judgment of the involuntary petition. The bank-

[2]Because the chief judge's and Judicial Council's consideration of judicial complaints is confidential, we do not discuss here the disposition of the complaint filed against the bankruptcy judge. *See* 28 U.S.C. § 360(a); Rule 16 of the Rules of the Judicial Council of the Ninth Circuit Governing Complaints of Judicial Misconduct or Disability.

ruptcy judge heard the motion on January 24, 2001, denying it on February 2.

On August 1, 2001, the petitioning creditors filed their own motion for summary judgment. Under 11 U.S.C. § 303, petitioners may impose involuntary bankruptcy on an alleged debtor only if certain conditions are met. If the debtor has more than 12 total creditors, which Focus did at the time of the petition, the petitioners must show that (1) there are at least three qualified petitioning creditors; (2) they each hold claims against the debtor not subject to bona fide dispute and totaling at least $10,775; and (3) the debtor is not generally paying debts as they become due. 11 U.S.C. § 303(b)(1), (h)(1).[3]

On September 25, the bankruptcy court granted the petitioning creditors' motion as to these three issues. Specifically, the bankruptcy court found that there was not a genuine issue for trial as to the petitioning creditors' showing that (1) seven of the eight petitioning creditors — ABC being the exception — had claims against Focus; (2) the claims of these seven petitioning creditors were not in bona fide dispute and totaled over $3 million; and (3) Focus's debt structure revealed that it was not generally paying its debts as they became due.[4]

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[3]Although the threshold amount listed in 11 U.S.C. § 303(b)(1) is $10,000, this threshold is adjusted for inflation at three year intervals. *See* 11 U.S.C. § 104. The requirement in effect when this proceeding commenced was $10,775. *See* Revision of Certain Dollar Amounts in the Bankruptcy Code Prescribed Under Section 104(B) of The Code, 66 Fed. Reg. 10910 (Feb. 20, 2001) (rasing amount from $10,775 to $11,625 for cases commenced on or after April 1, 2001); Revision of Certain Dollar Amounts in the Bankruptcy Code Prescribed Under Section 104(B) of The Code, 63 Fed. Reg. 7179 (Feb. 12, 1998) (raising amount from $10,000 to $10,775 for cases commenced on or after April 1, 1998).

[4]The court explained that its finding that Focus was not paying its debts as they came due was "independent and separate" from a similar finding previously imposed as a discovery sanction on Focus after four hearings regarding Focus' discovery noncompliance.

The bankruptcy court, however, denied the petitioning creditors summary judgment on Focus' affirmative defense of bad faith as to ABC. Expressing concern that a reviewing court might conclude that bad faith by ABC could defeat the petition entirely, the bankruptcy judge therefore declined to issue an order for relief in favor of the petitioning creditors. Instead, she held over for trial the issues of whether ABC had a claim against Focus and whether ABC had filed against Focus in bad faith. After a trial, the bankruptcy court ruled in favor of ABC on these issues and entered an order for relief on October 22, 2001. Focus promptly filed a notice of appeal to the district court from the order for relief and, after the district court affirmed the bankruptcy court, filed a combined notice of appeal with this court on May 12, 2003. Although Focus has appealed the bankruptcy court's grant of summary judgment and denials of its disqualification motions, it has not appealed its claim of bad faith by ABC.

DISCUSSION

"We independently review the bankruptcy court's ruling without deference to the district court's decision." *Virtual Vision, Inc. v. Praegitzer Indus., Inc. (In re Virtual Vision, Inc.)*, 124 F.3d 1140, 1143 (9th Cir. 1997). Whereas the bankruptcy court's decision to grant summary judgment is reviewed de novo, its factual findings are reviewed for clear error. *See Am. Broad. Sys., Inc. v. Beta Communications, Inc. (In re Betacom of Phoenix, Inc.)*, 240 F.3d 823, 828 (9th Cir. 2001). Summary judgment is appropriate "if the record shows that 'there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.' " *Arrow Elecs., Inc. v. Justus (In re Kaypro)*, 218 F.3d 1070, 1073 (9th Cir. 2000) (quoting Fed. R. Civ. P. 56(c)). Further, we review for abuse of discretion the bankruptcy court's denial of Focus' motions for disqualification. *United States v. Wilkerson*, 208 F.3d 794, 797 (9th Cir. 2000). Because Focus' prior claim of bad faith by ABC is not before us, the order of relief can be sustained if we uphold the district court's affir-

mation of the bankruptcy court's summary judgment order and denial of Focus' motions for disqualification.

I. Mootness

Appellees contend that Focus' appeal is moot because Focus failed to obtain a stay in either the bankruptcy court or the district court and failed to seek one in this court. According to appellees, the trustee has filed and abandoned various claims in the bankruptcy proceeding and granting relief to Focus would create an unmanageable situation in the bankruptcy court.

[1] Bankruptcy appeals may become moot in one of two (somewhat overlapping) ways. First, events may occur that make it impossible for the appellate court to fashion effective relief. *Bennett v. Gemmill (In re Combined Metals Reduction Co.)*, 557 F.2d 179, 187 (9th Cir. 1977). For example, when a trustee has already sold assets to third parties, a court may be powerless "to undo what has already been done." *Id.* However, "[t]he party asserting mootness has a heavy burden to establish that there is no effective relief remaining for a court to provide." *Pintlar Corp. v. Fid. & Cas. Co. (In re Pintlar Corp.)*, 124 F.3d 1310, 1312 (9th Cir. 1997). Second, an appeal may become equitably moot when "[a]ppellants have failed and neglected diligently to pursue their available remedies to obtain a stay of the objectionable orders of the Bankruptcy Court," thus "permitt[ing] such a comprehensive change of circumstances to occur as to render it inequitable . . . to consider the merits of the appeal." *Trone v. Roberts Farms, Inc. (In re Roberts Farms, Inc.)*, 652 F.2d 793, 798 (9th Cir. 1981). In *Roberts Farms*, "[a]ppellants did not at any time apply to the bankruptcy judge for a stay," *id.* at 795, and we concluded that dismissal for mootness was appropriate, *id.* at 798.

[2] Fashioning relief in this case would not be impossible. Focus seeks relief primarily under 11 U.S.C. § 303(i). When

a court dismisses an involuntary petition, § 303(i)(1) allows an award of costs and attorney's fees from the petitioners to the debtor. Here, Focus also asks us to order the disgorgement of attorney's fees previously paid out of Focus' estate to the petitioning creditors' attorneys. To clear the way for the relief Focus seeks, we would have to return control of the business to Focus, discharge the trustee and dismiss the involuntary petition. *See Semel v. Dill (In re Dill)*, 731 F.2d 629, 632 (9th Cir. 1984) ("An award of attorney's fees under 11 U.S.C. § 303(i) depends upon dismissal of the petition."). Because we could fashion these equitable remedies, effective relief is available to Focus, and this case is therefore not moot under the first type of mootness. *See Spirtos v. Moreno (In re Spirtos)*, 992 F.2d 1004, 1007 (9th Cir. 1993) (holding appeal not moot when court could order debtor to return to the estate post-confirmation distributions of pension plan assets).

[3] Neither are we persuaded that we should dismiss Focus' appeal as equitably moot. Appellees have not demonstrated that this case "present[s] transactions that are so complex or difficult to unwind that the doctrine of equitable mootness would apply." *Lowenschuss v. Selnick (In re Lowenschuss)*, 170 F.3d 923, 933 (9th Cir. 1999). Because Focus seeks an exit instead of a do-over — *i.e.*, the termination of bankruptcy proceedings and the dismissal of the trustee, rather than a complex corporate restructuring — the requested relief is not only possible but decidedly more practicable than the relief sought in other bankruptcy appeals we have dismissed as moot. *See Baker & Drake, Inc. v. Pub. Serv. Comm'n (In re Baker & Drake, Inc.)*, 35 F.3d 1348, 1351-52 (9th Cir. 1994) (holding appeal not moot where bankruptcy proceedings involved third parties but "unlike *Roberts Farms* and [*Rochman v. Northeast Utils. Serv. Group (In re Pub. Serv. Co.)*, 963 F.2d 469 (1st Cir. 1992)], [the] reorganization plan is not a complex, billion-dollar affair that has affected 'innumerable' third parties"); *cf. Mann v. Alexander Dawson Inc. (In re Mann)*, 907 F.2d 923, 926 (9th Cir. 1990) (explaining debtor's failure to obtain stay of foreclosure sale pending appeal

rendered moot his appeal of bankruptcy court's ruling on foreclosure action, where debtor under California law no longer had right of redemption in the property and the sale would not be set aside).[5] Moreover, "an order compelling disgorgement of [attorney's] fees and expenses would not require the bankruptcy court to unravel a complicated bankruptcy plan. Rather, it would require only that one party disgorge money it has received, money that would then be distributed pursuant to the bankruptcy court's final decree." *S.S. Retail Stores Corp. v. Ekstrom (In re S.S. Retail Stores Corp.)*, 216 F.3d 882, 884 (9th Cir. 2000).

[4] Finally, unlike the appellants in *Roberts Farms*, Focus did seek stays of the order for relief in the bankruptcy court and before the district court. These requests were denied. Moreover, Focus did not invite these bankruptcy proceedings; rather, the petitioning creditors forced Focus into bankruptcy. We therefore decline to dismiss this appeal based on equitable mootness.

II. Summary Judgment

A. Bona Fide Dispute

[5] Petitioners in an involuntary Chapter 7 proceeding must establish that they have claims totaling at least $10,775 that are not subject to bona fide dispute. 11 U.S.C. § 303(b)(1). Here, Focus contends that the petitioning creditors' claims are

[5]In *Baker & Drake*, Baker had supported its mootness argument by pointing to other claimants "who have expended time and money to resolve their claims through an arbitration procedure established under the plan." 35 F.3d at 1352 n.2. But Baker gave "no specifics with regard to their numbers, their claims, or how far along in the claims-resolution process they have come." *Id.* We concluded that "[t]his information is therefore *too vague* to be given much weight in our mootness analysis." *Id.* (emphasis added). Here, appellees' argument for mootness is similarly vague; they have not identified specific events or developments in the proceedings that preclude relief.

subject to bona fide dispute, notwithstanding the bankruptcy court's finding that Focus owed the petitioning creditors millions of dollars. Focus contends that its obligations to these creditors is in dispute because of potential adjustments Focus' clients may be entitled to from the petitioning creditors.

[6] In declarations filed in Focus' state court litigation with Sears, Focus' chairman and chief executive officer, Tom Rubin, explained that Focus "routinely [paid] the media 90 days after [receiving] their bills." Rubin also admitted that Focus was "liable to the media for many millions of dollars." A document that surfaced in the bankruptcy proceedings, Focus' aged payables report, confirmed Rubin's admission, listing $3 million in debts older than 90 days that Focus owed to the petitioning creditors as of March 31, 2000.[6] This amount far exceeds the $10,775 required by § 303(b)(1).[7]

1.

Focus contends that the amounts listed in its aged payables report overstate its actual debts because of an adjustment process called "post-analysis," whereby Focus would reconcile advertising charges with the media for commercial spots that failed to run at the promised time or to achieve the promised audience. According to Focus, post-analysis "is completed 90 to 180 days after the end of the quarter," after which Focus would contact the media stations to negotiate compensation for nonconforming commercials. Thus, for example, "[t]he

[6]This total refers only to the debts of seven of the eight petitioning creditors, excluding those claimed by ABC. Because we conclude that the petitions filed by the seven petitioning creditors other than ABC are sufficient to satisfy the requirements of § 303, we do not decide whether ABC had a qualifying claim against Focus.

[7]Focus argues that Rubin's declarations and the aged payables report were not properly authenticated in the bankruptcy court. Because Focus raises this issue for the first time on appeal, it is waived. *See Ganis Credit Corp. v. Anderson (In re Jan Weilert RV, Inc.)*, 315 F.3d 1192, 1199 (9th Cir. 2003).

parties . . . agreed that Focus Media would pay invoices from NBC's stations within 90 days after receipt of the station invoice, and that [post-analysis] would be resolved by negotiation and compromise, before any litigation was filed."

It is undisputed that the commercial spots giving rise to the debts listed in Focus' aged payables report were never subjected to post-analysis. Focus contends, however, that it was unable to conduct a post-analysis because its employees quit during the bankruptcy proceeding and because the trustee took custody of the relevant files. In lieu of a post-analysis, Focus submitted to the bankruptcy court declarations from analysts who alleged that the petitioning creditors had overcharged Focus and, more generally, that a full post-analysis would reduce the amounts Focus owed to the petitioning creditors. Focus contends that because there has not been a full reconciliation of its debts to the petitioning creditors, those debts cannot be ascertained with certitude and are thus in dispute.

Moreover, relying on our decision in *Liberty Tool & Manufacturing v. Vortex Fishing Systems, Inc. (In re Vortex Fishing Systems)*, 277 F.3d 1057 (9th Cir. 2002), Focus further contends that *any* uncertainty or dispute as to the amount of a debt is a bona fide dispute unless the dispute arises from a transaction that is wholly separate from the debt itself. *Vortex* held that a bona fide dispute exists when there is "a legitimate disagreement over whether money is owed, or, *in certain cases*, how much." *Id.* at 1064 (emphasis added). *Vortex* also discussed *Chicago Title Insurance Co. v. Seko Investment, Inc. (In re Seko Investment, Inc.)*, 156 F.3d 1005 (9th Cir. 1998), noting that *Seko* had held that "a dispute as to the amount of a claim is not a bona fide dispute if it is based on a counterclaim arising from a wholly separate transaction." *Vortex*, 277 F.3d at 1065 n. 2. Focus argues that the uncertainty of the amounts owed to the petitioning creditors does not arise from a wholly separate transaction within the meaning of *Vortex* and *Seko*, and is therefore a bona fide dispute

that defeats the petition under 11 U.S.C. § 303(b)(1). We conclude that the bankruptcy court properly found against Focus both on the facts and as a matter of law.

2.

[7] Regarding the facts, the bankruptcy court found that even if post-analysis would have discovered nonconforming commercials that would have entitled Focus (or its clients) to an adjustment, the amounts shown as currently due in Focus' aged payables report remained valid. Rubin's explanation of post-analysis and his acknowledgment that Focus owed millions of dollars to the media companies establish that Focus was obligated to pay the amounts billed by the media as they came due, with any adjustments coming from a later and separate post-analysis. Further, as the district court explained:

> Focus makes only an argument for the *potential* that the amounts would be in dispute. At the stage of summary adjudication, it was incumbent upon Focus Media to present evidence to support its contention of disputes as to the actual amounts, listed in the reports or otherwise at issue, not merely to speculate how such claim could, potentially, be disputed. . . . [The declaration it submitted] amounted to argument, not a demonstration of a *bona fide* dispute.

Thus, the bankruptcy court properly concluded that Focus had not established any actual dispute as to the amounts owed the petitioning creditors.

[8] Regarding our case law, even assuming there was an actual, non-theoretical dispute as to the precise amounts Focus owed the petitioning creditors, under *Seko* such a dispute is relevant only if it takes the total debt below $10,775. We disagree with Focus' contention that an uncertainty or dispute as to amounts owed above $10,775 can create a bona fide

dispute as to the entire debt. When a counterclaim arises from the *same* transaction as the debtor's claim, it:

> may serve to work a diminution or setoff of the claim of the petitioning creditors. Because the Bankruptcy Code requires that the claims of petitioning creditors against a debtor aggregate [a certain amount], this diminution can reduce a petitioning creditor's claim so that the creditor is no longer eligible to file an involuntary petition.

Seko, 156 F.3d at 1008 (citations and internal quotation marks omitted).[8] Under *Seko*, a dispute as to the amount of a claim gives rise to a bona fide dispute only when (1) it does not arise from a wholly separate transaction *and* (2) "netting out the claims of debtors" could take the petitioning creditors below the amount threshold of § 303. *Id.*

[9] That *Vortex* referred only to the first of *Seko*'s premises does not undermine the second. *Seko*'s discussion of netting out the claims of debtors merely stated a widely accepted proposition regarding involuntary bankruptcy petitions: "[I]f at least a portion of the debt that is the subject of the petition is undisputed, the undisputed portion is sufficient to create a debt under Section 303(b)(1) not subject to a bona fide dispute." *IBM Credit Corp. v. Compuhouse Sys., Inc.*, 179 B.R. 474, 479 (W.D. Pa. 1995); *see Subway Equip. Leasing Corp. v. Sims (In re Sims)*, 994 F.2d 210, 221 (5th Cir. 1993) (explaining that even if creditors had failed to make reasonable efforts to mitigate their damages, "any such failure would

[8]*Seko* analogized its counterclaim analysis to recoupment, insofar as a counterclaim for recoupment must arise out of the same transaction that is the basis of the initial claim. "Although recoupment is usually asserted by a creditor against a debtor, there is no reason the principles should differ when the positions of the parties are reversed." 156 F.3d at 1009. Thus, "[t]he practice of netting out the claims of debtors and their creditors only makes sense when a counterclaim for recoupment on a creditor's claim is involved." *Id.* at 1008.

serve only to reduce the amount of [their] claims . . . [;] it would not constitute a substantial factual or legal question bearing on the debtors' liability"); *see also In re Willow Lake Partners II, L.P.*, 156 B.R. 638, 642 43 (Bankr. W.D. Mo. 1993); *In re F.R.P. Indus., Inc.*, 73 B.R. 309, 312 (Bankr. N.D. Fla. 1987); *In re Onyx Telecomm., Ltd.*, 60 B.R. 492, 497 (Bankr. S.D.N.Y. 1985); 2 Collier on Bankruptcy § 303.03[2][b][i] (15th Ed. revised 2000) [hereinafter "Collier"] (citing *Seko* for the proposition that "a counterclaim arising out of a different transaction (and hence not creating a right of recoupment) does not evidence the existence of a bona fide dispute. Counterclaims, however, may be relevant in determining whether the requisite dollar amount is met under section 303(b)(1) or whether the debtor is generally not paying its debts as they become due under section 303(h)(1).").

[10] Applying this proposition here, we conclude that Focus did not raise a triable issue of fact as to whether the petitioning creditors have claims totaling at least $10,775 that are not subject to a bona fide dispute. Plainly, Focus did not present evidence to show that its debts to the petitioning creditors fell below this threshold. Nothing in the record rebuts the petitioning creditors' documented assertions that their claims totaled millions of dollars, well over $10,775. Nor is there evidence suggesting that any post-analysis would have generated adjustments of the magnitude necessary to shrink the millions of dollars of debt anywhere near $10,775, much less below that amount. Moreover, Focus has not pointed to evidence that the interim trustee prevented it from conducting post-analysis, or any authority supporting its view that the departure of Focus' employees excused it from having to conduct post-analysis. We therefore hold that the bankruptcy court appropriately granted summary judgment to the petitioning creditors, finding that they collectively held claims totaling at least $10,775 that were not subject to a bona fide dispute.

B. Three-Entity Requirement

[11] The eight petitioning creditors include ABC and five of its affiliates. The affiliates' qualifications as petitioning creditors were determined at summary judgment, whereas ABC's qualifications were determined after trial. Focus now contends that ABC and its affiliates are disqualified as petitioning creditors because they illicitly transferred or acquired claims for the purpose of initiating the involuntary bankruptcy in violation of Bankruptcy Rule 1003(a), which provides:

> A transferor or transferee of a claim shall annex to the original and each copy of the petition a copy of all documents evidencing the transfer, whether transferred unconditionally, for security, or otherwise, and a signed statement that the claim was not transferred for the purpose of commencing the case and setting forth the consideration for and terms of the transfer. An entity that has transferred or acquired a claim for the purpose of commencing a case for liquidation under chapter 7 or for reorganization under chapter 11 shall not be a qualified petitioner.

Here, the petition would not satisfy the three-entity requirement of § 303(b)(1) only if Focus is correct that ABC *and* its five affiliates are disqualified as petitioning creditors under Rule 1003, in which case only NBC and Paxson would remain.

During the trial concerning ABC's petition, ABC offered testimony that its affiliates had turned to ABC to facilitate the collection of debts owed them by Focus. Tanya Menton, an attorney for ABC, testified in reference to these debt collection efforts that, "in my humble opinion . . . there was a transfer of all of the claims [from the ABC affiliates] to ABC, Inc." She explained, however, that the affiliates "did not come to [her] and ask that [she] file a petition for involuntary bankruptcy," but instead sought her help in collecting *their* claims

against Focus. Relying on Menton's testimony, Focus argues that ABC and its five affiliates cannot be qualified petitioning creditors because they "transferred or acquired a claim for the purpose of commencing a case for liquidation under chapter 7" in violation of Rule 1003(a).[9]

Rule 1003 endeavors to curtail "trafficking" in claims. *Sims*, 994 F.2d at 216 n.6; *In re Butcher*, 32 B.R. 572, 575 n.9 (Bankr. E.D. Tenn. 1983). Without Rule 1003, such trafficking could enable entities without proper claims to acquire them and thus become petitioning creditors, or facilitate claim-splitting by companies seeking to satisfy the three-entity requirement. *See In re Averil, Inc.*, 33 B.R. 562, 563 (Bankr. S.D. Fla. 1983) (expressing concern that "[i]f the co-owners of a single obligation qualify as separate claimants . . . [the] legislative purpose [of requiring a joint effort to launch an involuntary proceeding] would be frustrated").

Here, the bankruptcy court did not err in finding that there were no illicit transfers. Notwithstanding Menton's testimony, the bankruptcy court observed:

> Nobody testified to there being an oral or written request for transfer. Ms. Menton's feeling that those entities wanted ABC, Inc. to collect the debt from Focus falls far short of there being a legally valid transfer or an assignment from the subsidiaries to

[9]Appellees argue that Focus has waived its Rule 1003 argument by failing to raise it at the summary judgment stage before the bankruptcy court or at all before the district court. Even assuming a waiver occurred, the issue is one of law, and the record has been adequately developed because the bankruptcy court in fact considered (and rejected) Focus' argument that ABC's affiliates were disqualified as petitioners under Rule 1003. We therefore reach the merits of Focus' claim. *See Bolker v. Comm'r*, 760 F.2d 1039, 1042 (9th Cir. 1985) (holding exception to the waiver rule exists "when the issue presented is purely one of law and either does not depend on the factual record developed below, or the pertinent record has been fully developed").

> ABC, Inc. Moreover there was no testimony about any particular subsidiary.

In addition, Focus' contention that the ABC affiliates transferred their claims to ABC is contradicted by a prior agreement between ABC and Focus. According to that agreement, ABC could not claim for itself debts owed to separately incorporated media stations, even if those stations were affiliates of ABC. Consistent with the agreement, ABC never did contend that it qualified as a petitioning creditor based on the debts owed to the five ABC affiliates that separately filed their own petitions.[10] Thus, the bankruptcy court did not err in rejecting Menton's characterization of the facts and finding instead that ABC's affiliates had not transferred their claims to ABC.

[12] We therefore conclude that ABC and its five affiliates were not subject to disqualification as petitioning creditors under Rule 1003. Given that NBC, Paxson and the five ABC affiliates each holds claims against Focus that are not subject to a bona fide dispute, the bankruptcy court correctly concluded that there was no triable issue of fact regarding § 303(b)(1)'s three-entity requirement.

C. Paying Debts as they Become Due

Because we agree with the bankruptcy court that there were

[10]Consistent with the parties' agreement, ABC did assert at trial that it could claim debts owed to stations that it owned directly (as opposed to separately incorporated affiliates). Based on these debts, which did not include the debts Focus owed to the five affiliates that filed their own petitions, the bankruptcy court concluded after trial that ABC was a qualified petitioner. Because we conclude that the five ABC affiliates that filed their own petitions did not violate Rule 1003 and are qualified petitioning creditors, ABC's status is irrelevant to whether § 303(b)(1)'s three-entity requirement has been met. Thus, we do not decide whether ABC could assert the claims of its directly owned subsidiaries and, accordingly, whether ABC itself is a qualified petitioning creditor.

no triable issues of fact regarding the bona fide dispute and three-entity issues, we turn to the issue of whether Focus was not generally paying its debts as they became due. *See* 11 U.S.C. § 303(h)(1). Before summary judgment, the bankruptcy court imposed a discovery sanction on Focus, establishing as fact that Focus was not generally paying its debts as they became due. Nonetheless, in granting summary judgment, the bankruptcy court made an "independent and separate" finding to this effect based on the record before it.

[13] We agree with the bankruptcy court's grant of summary judgment on this issue. This circuit has adopted a "totality of the circumstances" test for determining whether an alleged debtor is generally paying its debts as they become due. *Hayes v. Rewald (In re Bishop, Baldwin, Rewald, Dillingham & Wong, Inc.)*, 779 F.2d 471, 475 (9th Cir. 1985). Thus, "[a] finding that a debtor is generally not paying its debts 'requires a more general showing of the debtor's financial condition and debt structure than merely establishing the existence of a few unpaid debts.' " *Vortex*, 277 F.3d at 1072 (quoting *Dill*, 731 F.2d at 632). In *Vortex*, for example, we held that the bankruptcy court did not clearly err in finding that Vortex was generally paying its debts as they became due, where "Vortex ha[d] been paying off the debts it ha[d] incurred, including a full settlement of the IRS deficiency that was assessed." 277 F.3d at 1072.

[14] The circumstances of *Vortex* are not replicated here. As we have explained, Rubin admitted in his state court declarations that Focus' debts to media companies became due within 90 days of receiving their invoices and that Focus owed media companies millions of dollars for such debts. There is no evidence that Focus was paying off its debts owed to the media companies at all, let alone within 90 days. Further, the bankruptcy court explained:

> Th[e] aged payables report (as of 3/31/00) shows $63,884,983 total owed to creditors listed in the

> report, of which $49,482,956 is OVER 90 days old. No evidence has been presented on this motion by Focus that any of this was paid between 3/31/00 and the date the petition was filed (10/06/00). Having 80% of your debts over 90 days old is not paying debts as they come due.

[15] We agree. The record does not depict a company with a few unpaid bills. Instead, it depicts a company that had substantial amounts of unpaid bills and no plans or ability to pay them. Finally, Focus does not contend that the bankruptcy court's discovery sanction ruling prevented it from demonstrating that it was paying off its debts.[11] We therefore conclude that Focus failed to create a triable issue of fact regarding whether it was generally paying its debts as they became due.

III. Recusal

"Any justice, judge, or magistrate judge of the United States shall disqualify [herself] in any proceeding in which [her] impartiality might reasonably be questioned." 28 U.S.C. § 455(a). In reviewing the bankruptcy judge's denials of Focus' disqualification motions for abuse of discretion, "[t]he test is whether a reasonable person with knowledge of all the facts would conclude that [her] impartiality might reasonably be questioned." *Wilkerson*, 208 F.3d at 797 (internal quotation marks omitted). Here, Focus contends that the bankruptcy judge orchestrated the bankruptcy proceedings to ensure that the petitioning creditors would prevail. Focus infers this bias from the bankruptcy judge's (1) substantive rulings, (2) references to the judicial misconduct complaint filed against her and to possible misconduct by Focus' principals and (3) conduct of the proceedings in general. Based on our review of the record, we conclude that a reasonable person with knowledge

[11]Because we affirm on the merits, we do not decide whether the bankruptcy court abused its discretion in imposing the discovery sanction.

of all the facts would neither infer such bias nor otherwise question the bankruptcy judge's impartiality.

A. Substantive Rulings

The rulings about which Focus complains include: the bankruptcy judge's appointment of an interim trustee; her refusal to order the trustee to pay Focus' attorney's fees and costs out of the estate; discovery sanctions she imposed on Focus; and her failure to sanction the petitioning creditors. Notwithstanding Focus' complaints,

> judicial rulings alone almost never constitute a valid basis for a bias or partiality motion. In and of themselves (*i.e.*, apart from surrounding comments or accompanying opinion), they cannot possibly show reliance upon an extrajudicial source; and can only in the rarest circumstances evidence the degree of favoritism or antagonism required . . . when no extrajudicial source is involved.

Liteky v. United States, 510 U.S. 540, 555 (1994) (internal citation omitted).

[16] Here, Focus has not shown that the bankruptcy court's substantive rulings were products of "deep-seated favoritism or antagonism that [made] fair judgment impossible." *Id.* Rather, Focus argues that these rulings were erroneous and that such error is itself evidence of bias. This argument does not support a recusal motion. "Judges are known to make procedural and even substantive errors on occasion. The errors alleged here would be the basis for appeal, not recusal." *F.J. Hanshaw Enters., Inc. v. Emerald River Dev., Inc.*, 244 F.3d 1128, 1145 (9th Cir. 2001).

B. References

Focus also alleges that the bankruptcy judge improperly referred to the judicial misconduct complaint filed against her

by Focus' chief financial officer, Thomas Sullivan, and to possible misconduct by Focus' principals. But these references, like the bankruptcy court's substantive rulings, related to the merits of the bankruptcy proceedings.

Sullivan filed the judicial misconduct complaint with the Judicial Council of this circuit. The relevant statute provides that a copy of any such complaint shall be provided to the judge whose conduct is the subject of the complaint. *See* 28 U.S.C. § 351(c). The bankruptcy judge explained that because the complaint contained information and allegations relevant to the bankruptcy proceedings — specifically, Sullivan's characterization of the bankruptcy proceedings up to the filing of the complaint — she provided a copy of it to the petitioning creditors. She also permitted the petitioning creditors to question Sullivan about his assertions in the complaint, in particular his contention that the bankruptcy judge had "repeatedly relinquished control over the defense of this contested case to [the] interim trustee." When asked to support this contention, Sullivan invoked his Fifth Amendment rights against self-incrimination. Subsequently, in assessing Sullivan's credibility, the bankruptcy judge cited the complaint (but not Sullivan's invocation of the Fifth Amendment) — among other, damaging statements by Sullivan — in concluding that he could not be believed. Although the situation was perhaps unusual, a reasonable person with knowledge of all the facts would conclude that the bankruptcy judge referred to the judicial misconduct complaint because she had concluded that Sullivan's factual allegations in the complaint undermined his credibility, not because the complaint itself biased the bankruptcy judge against Focus. Absent some evidence of real bias, we are not prepared to infer bias lest we open the door to misuse of the judicial misconduct complaint process as a means of removing a disfavored judge from a case.

[17] The bankruptcy judge also alluded to the possibility that Focus' principals might have impeded discovery and improperly disbursed Focus' assets. Such potential malfea-

sance was relevant to the bankruptcy proceedings, however, because of the bankruptcy judge's role in assessing whether discovery sanctions were appropriate and whether Focus' assets were being properly kept and accounted for. Although Focus contends that no malfeasance occurred, it cannot reasonably argue that the issue was irrelevant to a proceeding designed to ensure the proper disposition of Focus' assets. The bankruptcy judge's references to Focus' potential malfeasance do not, therefore, provide a basis for questioning her impartiality.

C. Administration of the Proceedings

Finally, Focus points to the bankruptcy judge's administration of the proceedings as potential evidence of partiality. Although the proceedings were lengthy and the bankruptcy judge may at times have been stern, Focus has cited nothing in the record to suggest that the bankruptcy judge was unwilling to hear and respond to Focus' concerns and arguments. For example, although the bankruptcy judge expressed frustration with Focus' discovery responses and ultimately imposed a discovery sanction, she routinely sought Focus' version of the story and interrogated petitioning creditors' counsel about that version. Similarly, although Focus complains about a hearing that ended at almost one o'clock in the morning, Focus does not explain how the hearing was intended to disadvantage Focus. On the contrary, the bankruptcy judge stated that she thought "it was in the interest of justice to get this completed."

[18] " '[J]udicial remarks during the course of a trial that are critical or disapproving of, or even hostile to, counsel, the parties, or their cases, ordinarily do not support a bias or partiality challenge.' " *United States v. Martin*, 278 F.3d 988, 1005 (9th Cir. 2002) (quoting *Liteky*, 510 U.S. at 555). Here, the bankruptcy judge's comments "may have been testy, but they do not justify a recusal under *Liteky*. The comments were not based on any extrajudicial source. Rather, the judge's

'knowledge and the [disposition she] produced were properly and necessarily acquired in the course of the proceedings.' " *Id.* (quoting *Liteky*, 510 U.S. at 551). To the extent the bankruptcy judge treated Focus with disapproval, she did so by way of adverse rulings and — a reasonable observer would conclude — because of her view that Focus' claims tended to lack merit and that its cooperation (particularly during discovery) left much to be desired. These actions do not support Focus' argument that the bankruptcy judge's rulings evinced a broader, improper design to hurt Focus. We therefore hold that the bankruptcy judge did not abuse her discretion in denying Focus' motions for disqualification.

CONCLUSION

We agree with the bankruptcy court that Focus did not create a triable issue of fact regarding whether the petitioning creditors' claims were subject to a bona fide dispute, whether there were at least three qualified petitioning creditors or whether Focus was generally paying off its debts as they became due. We also hold that the bankruptcy judge did not abuse her discretion in denying Focus' motions for disqualification.

AFFIRMED.

APPENDIX B

DRAFTED BY THE COURT

ENTERED
SEP 25 2001
CLERK, U.S. BANKRUPTCY COURT
CENTRAL DISTRICT OF CALIFORNIA
BY _____ DEPUTY CLERK

FILED
SEP 24 2001
CLERK, U.S. BANKRUPTCY COURT
CENTRAL DISTRICT OF CALIFORNIA
BY _____ DEPUTY

UNITED STATES BANKRUPTCY COURT
CENTRAL DISTRICT OF CALIFORNIA
LOS ANGELES DIVISION

In re:

FOCUS MEDIA, INC.,
Alleged Debtor.

NATIONAL BROADCASTING COMPANY, INC.; et al.,
Petitioning Creditors,
v.
FOCUS MEDIA, INC.,
Alleged Debtor.

Case No. LA 00-38197-KM
Involuntary Chapter 7

ORDER GRANTING PETITIONING CREDITORS' MOTION FOR SUMMARY JUDGMENT IN PART AND DENYING MOTION IN PART – SUMMARY ADJUCIATION GRANTED ON CERTAIN ISSUES, SUMMARY ADJUDICATION DENIED ON OTHER ISSUES, AND SUMMARY JUDGMENT TO ENTER ORDER FOR RELIEF DENIED

Date: August 28, 2001
Time: 2:00 p.m.
Place: Courtroom 1468

Hon. Kathleen P. March
Edward R. Roybal Center
255 E. Temple Street
Los Angeles, CA 90012

Petitioning Creditors' Motion For Summary Judgment On Involuntary Petition In Bankruptcy ("the Motion") came on for hearing on August 28, 2001 at 2:00 p.m. before the Honorable Kathleen P. March, United States Bankruptcy Judge. Eliot G. Disner of Ervin, Cohen & Jessup, LLP and Geoffrey Mousseau & Associates appearing for Focus Media, Inc. ("Focus"), and Howard J. Steinberg and Sean K. Lokey of Irell & Manella LLP appearing for the Petitioning Creditors. After considering the papers, arguments of counsel and all other matters presented to the Court, for the reasons stated on the record and good cause appearing therefore:

1) IT IS ORDERED that the Court GRANTS summary adjudication in favor of the Petitioning Creditors and against Focus on the following issues, pursuant to FRCP Rule 56, as

incorporated into bankruptcy practice by FRBP Rule 7056 and applicable case law:

a. Sufficient debt is owed to creditors by Focus, that was not being paid as it came due by Focus to these creditors, and which was NOT in bona fide dispute or contingent as to liability, to entitle the petitioning creditors an order for relief being entered in this involuntary proceeding, pursuant to 11 U.S.C. §303(h) and 11 U.S.C. §303(b)(1).

b. There are at least seven (7) of the eight (8) petitioning creditors who are authorized to be petitioning creditors, and who are owed by Focus, in general unsecured debt, more than the statutorily required aggregate amount of $10,775, and the Court therefore would not have to reach the question of whether or not ABC is somehow not entitled to be a petitioning creditor, because there are seven (7) other petitioning creditors, but intends to try the factual issue of ABC's alleged bad faith for reasons stated in the Findings of Fact and Conclusions of Law.

c. There was no evidence presented by Focus of any misfeasance or nonfeasance of the interim trustee. Therefore, the Court finds that Focus has not met its burden as to its alleged defense for failures to act by the interim trustee – which would not be a defense in any event as a matter of law – and the Court GRANTS summary adjudication in favor of the Petitioning Creditors on the issue of whether any acts or failures to act by the interim trustee is a defense to the involuntary petition; and

2) IT IS ORDERED that the Court DENIES summary adjudication in favor of Petitioning Creditors on Focus' affirmative defense of alleged bad faith of ABC and alleged unclean hands of Petitioning Creditors, which affirmative defenses remain for trial.

3) The Court adopts as its findings of fact and conclusions of law a) the written tentative ruling on this issue that was posted on the webPacer system and b) the comments regarding the *Celotex* trilogy standard, made on the record at the hearing on this matter, which the Court has now typed up itself as its findings of fact and conclusions of law, signed this date as a separate pleading.

DATED: September 24, 2001

/s/ Kathleen P. March
KATHLEEN P. MARCH
United States Bankruptcy Judge

In re (short title)	Chapter 7 Case Number:
Focus Media, Inc. Debtor	LA00-38197KM

NOTICE OF ENTRY OF JUDGMENT OR ORDER AND CERTIFICATE OF MAILING

TO ALL PARTIES ON THE ATTACHED SERVICE LIST:

1. You are hereby notified, pursuant to Local Bankruptcy Rule 9021-1(v), that a judgment or order entitled (*specify*):

ORDER GRANTING PETITIONING CREDITORS' MOTION FOR SUMMARY JUDGMENT IN PART AND DENYING MOTION ON PART – SUMMARY ADJUDICATION GRANTED ON CERTAIN ISSUES, SUMMARY ADJUDICATION DENIED ON OTHER ISSUES, AND SUMMARY JUDGMENT TO ENTER ORDER FOR RELIEF DENIED

was entered on (*specify date*): SEP 25 2001

2. I hereby certify that I mailed a copy of this notice and a true copy of the order or judgment to the persons and entities on the attached service list on (*specify date*):

SEP 25 2001

DATED: SEP 25 2001

JON D. CERETTO
Clerk of the Bankruptcy Court

By: /s/
Deputy Clerk

SERVICE LIST

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16311 VENTURA BOULEVARD, SUITE 1200
ENCINO, CA 91436-2152

APPENDIX C

C-1

DRAFTED BY THE COURT

ENTERED
SEP 25 2001
CLERK, U.S. BANKRUPTCY COURT
CENTRAL DISTRICT OF CALIFORNIA
BY _____ DEPUTY CLERK

FILED
SEP 24 2001
CLERK, U.S. BANKRUPTCY COURT
CENTRAL DISTRICT OF CALIFORNIA
BY _____ DEPUTY

UNITED STATES BANKRUPTCY COURT
CENTRAL DISTRICT OF CALIFORNIA
LOS ANGELES DIVISION

In re:

FOCUS MEDIA, INC.,
Alleged Debtor.

NATIONAL BROADCASTING COMPANY, INC.; et al.,
Petitioning Creditors,
v.
FOCUS MEDIA, INC.,
Alleged Debtor.

Case No. LA 00-38197-KM
Involuntary Chapter 7

FINDINGS OF FACT AND CONCLUSIONS OF LAW ON PETITIONING CREDITORS' MOTION FOR SUMMARY JUDGMENT/ SUMMARY ADJUDICATION ON INVOLUNTARY PETITION IN BANKRUPTCY

Date: August 28, 2001
Time: 2:00 p.m.
Place: Courtroom 1468

Hon. Kathleen P. March
Edward R. Roybal Center
255 E. Temple Street
Los Angeles, CA 90012

Petitioning Creditors' Motion for Summary Judgment On Involuntary Petition In Bankruptcy came on for hearing on August 28, 2001 at 2:00 p.m. before the Honorable Kathleen P. March, United States Bankruptcy Judge. Eliot G. Disner of Ervin, Cohen & Jessup, LLP and Geoffrey Mousseau of Mousseau & Associates appearing for Focus Media, Inc. ("Focus"), and Howard J. Steinberg and Sean K. Lokey of Irell & Manella LLP appearing for Petitioning Creditors. The Court makes the following findings of fact and conclusions of law:

ELEMENTS OF 11 USC §303 – PETITIONING CREDITORS BEAR THE BURDEN OF PROVING ALL ELEMENTS OF §303, BY A PREPONDERANCE OF THE EVIDENCE, OR ORDER FOR RELIEF CANNOT BE ENTERED; SUMMARY JUDGMENT/SUMMARY ADJUDICATION CAN ONLY BE GRANTED IF THE EVIDENCE OVERALL SHOWS NO GENUINE ISSUE AS TO ANY RELEVANT MATERIAL FACT, AND TO

OBTAIN GRANT OF SUMMARY JUDGMENT MOVANT MUST SHOW MOVANT IS ENTITLED TO JUDGMENT AS A MATTER OF LAW [F.R.Civ.P. Rule 56(c), (d), incorporated into bankruptcy practice by F.R.B.P. Rule 7056 and Case law]:

1. Sufficient debt was owed by Focus to Focus' creditors, that Focus was not paying as it came due, as of the date the involuntary petition was filed in this case, to meet the standard of 11 USC §303(h)(1) that "the debtor [Focus] is generally not paying such debtor's debts as such debts became due" and it is irrelevant for purposes of meeting the standard of §303(h) whether the amount of debt not being paid as it came due was 49 some million, or "way more than 11 million", because either figure would constitute Focus generally not paying its debts as they came due for purposes of §303(h), compared to Focus' total debts owed. There was no genuine issue of triable fact on this issue, because the evidence presented by Focus was insufficient to create a genuine triable issue, pursuant to the Celotex trilogy[1] US Supreme Court case standard, in light of the strong admissions by Focus relied on by petitioning creditors in support of their motion.

2. These debts that Focus was not paying as they came due, were NOT in bona fide dispute, so that the "not in bona fide dispute" elements of 11 USC §303(h)(1) and 11 USC §303(b)(1), were each proven to be without genuine triable issue. Focus' admissions, (presented by petitioning creditors as the evidence support their motion) were not rebutted by

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[1] The US Supreme Court "*Celotex* Trilogy" on the standard for granting or denying summary judgment is *Celotex Corp. v. Catrett*, 477 US 317 (1986), *Matsushita Elec. Industrial Co. v. Zenith Radio*, 475 US 574 (1986) and *Anderson v. Liberty Lobby*, 480 US 903 (1987).

sufficient evidence from Focus to create a genuine triable issue regarding the bona fide dispute requirements of either 11 USC §303(h) or 11 USC §303(b)(1).

3. These millions of dollars of debts that Focus was not paying as they came due, including the debts owed by Focus to the 7 petitioning creditors other than ABC, were NOT contingent as to liability. There was no genuine issue of material fact regarding this issue, in light of the strong admissions of Focus relied on by petitioning creditors in their motion. See 11 USC §303(b)(1).

4. Focus' aged payables report, which is an admission of Focus pursuant to FER 801, shows $49,482,956 of debt owed by Focus to TV and radio stations as of 3/31/00, that was as of 3/31/00 over 90 days old. That 49 plus million of debt was over 9 months old as of the date the involuntary petition was filed, which was 10/06/00. Further, the aged payables report showed that hundreds of thousands of dollars was owed to the 7 petitioning creditors other than ABC. ABC, Inc. was not listed in the aged payables report, though various entities with ABC in their name were listed in the aged payables report. However, each of the other 7 petitioning creditors were listed in the Focus aged payables report as being owed debts over 90 days old by Focus.

5. Second, and as an independently sufficient ground for finding there are no genuine issues of material fact in dispute on the issues of "not paying debts generally as they came due", "bona fide dispute" or "contingent as to liability", is the ADMISSION of Focus state court attorney Bertram Fields, Esq, who is an authorized agent of Focus, [and who] stated on record in state court proceeding in the April 6, 2000 preliminary injunction hearing, that Focus owed "**far more than $11 million**" to TV and radio stations. In that hearing,

Focus was claiming that the amount Focus owed to its creditors was much higher than $11 million (the figure Judge Collins of the state court referred to).

6. There are at a minimum seven (7) of the eight (8) petitioning creditors who are authorized to be petitioning creditors, and who are owed by Focus, in general unsecured debt, more than the statutorily required aggregate amount of $10,775. Based on this Court's view of what the "better law"[2], is on the question of bad faith, this Court would not have to reach the question of whether or not ABC is somehow not entitled to be a petitioning creditor, because there are seven (7) other petitioning creditors, and the bad faith of one of multiple petitioning creditors, even if proven, would not require dismissing the involuntary case for bad faith, so long as there are at least 3 petitioning creditors that are eligible petitioning creditors, not in bad faith, as of the date the involuntary petition is adjudicated by the court.

7. Focus' Aged Payables Report, plus the admissions made by Field and Rubin in state Court, established that the 7 petitioning creditors other than ABC were owed together a

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[2] Despite this Court's view that the "better law" on bad faith would not require this Court to dismiss the involuntary petition even if ABC were ultimately proven to have acted in bad faith in being a petitioning creditor; this Court is planning to try the factual issue of whether or not ABC acted in bad faith, for two reasons: (1) Some higher court might disagree with this Court's view of what the "better law" on bad faith is; in light of the fact that there is no controlling Ninth Circuit or US Supreme Court case on this bad faith issue, and (2) If it turns out at trial that ABC did not act in bad faith in being a petitioning creditor, then a higher Court would not necessarily have to decide the question of what is the "better law" on bad faith by a single one of multiple petitioning creditors, unless the higher Court decided ABC had acted in bad faith, regardless of what this Court held after trying the involuntary petition affirmative defense of bad faith.

minimum of $10,775, general unsecured debt by Focus. The evidence presented by petitioning creditors in support of their motion proved by a preponderance of the evidence, (1) that the 7 petitioning creditors other than ABC were owed collectively hundreds of thousands of dollars by Focus, and (2) that as of the date the involuntary petition was filed, those amounts had been owing by Focus to the petitioning creditors, but unpaid, for nine months. Focus did not present enough evidence in its Opposition to controvert Focus' own admissions (i.e., Focus' business records, statements of Focus' attorney in state court, and the declarations filed in state court by Tom Rubin, then an executive officer of Focus) – the evidence relied upon by petitioning creditors – to meet the *Celotex Corp. v. Catrett*, 477 US 317 (1986) standard of establishing that there existed a genuine issue of fact to be tried regarding this issue.

8. The evidence presented by Focus in opposition to the evidence presented by the petitioning creditors was insufficient to create a triable issue of fact as to whether at least the minimum statutorily required amount of $10,775 was owed by Focus to the petitioning creditors, general unsecured, in the aggregate, and was insufficient to create a triable issue of fact as to whether that amount (minimum of $10,775 owed to the 7 petitioning creditors in the aggregate) was in bona fide dispute. As a result, applying the *Celotex* standard, the Court granted summary adjudication that the following fact had been proven to be without material factual dispute; i.e., that Focus owed the 7 petitioning creditors other than ABC a minimum of $10,775, in the aggregate, of general unsecured debt which was liquidated and not subject to bona fide dispute. Due to grant of summary adjudication to petitioning creditors regarding this fact, this fact does not remain as an issue for the Court to take testimony on in the upcoming trial of the involuntary petition.

9. Admissions of a party opponent, per Federal Rule of Evidence 801(d) can support grant of summary adjudication or summary judgment, and that is the key to this motion, because admissions of a party do not require the Court to weight the credibility of the party making the admission.

10. Focus' "Aged Payables Report", Exhibit 1037 to the Sullivan deposition is an admission of Focus, per FRE 801(d), that the amounts stated therein are owed to the creditors (TV/radio stations) listed therein. This document was produced by Focus' counsel to petitioning creditors' counsel in discovery and is sufficiently authenticated by the deposition testimony of Sullivan, a managing officer of Focus, as being a Focus business record.

11. This aged payables report (as of 3/31/00) shows $63,884,983 total owed to creditors listed in the report, of which $49,482,956 is OVER 90 days old. No evidence has been presented on this motion by Focus that any of this was paid between 3/31/00 and the date the petition was filed (10/06/00). Having 80% of your debts over 90 days old is not paying debts as they come due. Further, this Court has already previously issue adjudicated against Focus, as a discovery sanction, that Focus was not paying its debts as they came due. But the aged payable report prima facie establishes this anyhow, independent and separate from this Court's prior ruling. Each of the eight (8) petitioning creditors are on this "Aged Payables Report", for hundreds of thousands of dollars. Only three (3) petitioning creditors are needed, with a total in aggregate general unsecured debt of $10,775. Additional creditors are allowed to join the petition after the petition is filed. The court merely looks to see whether, on date involuntary is adjudicated, there are at least 3 eligible petitioning creditors owed, together, in the aggregate, the statutory amount of general unsecured debt, per 11 USC §303, i.e. $10,775.

12. Rubin's declaration claims bad acts by ABC and that ABC is ineligible, but this still leaves seven (7) petitioning creditors.

13. Eric Selten's declaration lacks foundation (he wasn't working at Focus at time of events, he's just a litigation consultant) to opine as to what debts of Focus are/are not in bona fide dispute or contingent as to liability.

14. Focus' aged payable report is an admission of Focus, admissible against Focus per FRE 801(d). The Court asked all parties to brief whether Focus or petitioning creditors have the burden of proof on the issue of bona fide dispute, but assuming arguendo, for purpose of this motion, that petitioning creditors have the burden of proving the debts owed by Focus are NOT in bona fide dispute, the aged payable report of Focus is an admission of Focus and prima facie proves the amounts listed therein are owed as listed therein. The burden of going forward would then be on Focus to present some evidence to rebut its own aged payable report.

15. Focus has not sustained this burden of going forward to present enough evidence to counter the evidence presented by petitioning creditors to establish that there is a triable issue of fact. NONE of the evidence submitted by Focus impeaches or casts doubt on the aged payable report to the point where a reasonable trier of fact could find in Focus' favor on this point. The *Celotex* trilogy standard for Focus avoiding a grant of summary adjudication against Focus on the bona fide dispute issue and the contingent as to liability issue is that Focus must present enough evidence to show there is a bona fide dispute and the debts are contingent as to liability such that a reasonable trier of fact could reasonably find on Focus' favor on these issues, in light of the fact that Focus' own business record, the Focus aged payable report prima facie

proves that $49 million is owed and owed over 90 days. Focus has not presented enough evidence to meet this standard. It has not impeached or rebutted its own aged payables report. It has not rebutted or impeached the admission of its own attorney, Mr. Fields, that Focus as of April 6, 2000 owed "way more" than $11 million to TV and radio stations.

16. The *Celotex* trilogy, cited supra, requires Focus, as the party opposing summary judgment, to present enough evidence to create a genuine issue of triable fact. As defined in the *Celotex* trilogy, doing so means presenting enough evidence that a reasonable trier of fact could find in Focus' favor on the disputed issue. Focus has not submitted enough evidence to sustain its burden of coming forward with enough evidence to controvert petitioning creditors' evidence that a triable issue of fact is shown to exist. Pursuant to the *Celotex* trilogy, Focus would have needed to present sufficient evidence to controvert Focus' own aged payables report, Focus' own attorney's admissions in state Court, and Rubin's admissions made in declarations filed in state court, that a reasonable finder of fact, looking at the evidence overall, could reasonably find in Focus' favor on the issues of (1) whether Focus was not generally paying its debts as they came due, (2) whether the millions of dollars of debt that Focus was NOT paying as it came due was the subject of bona fide dispute or contingent as to liability, and (3) whether the debts Focus owed to the petitioning creditors but was not paying was either in bona fide dispute or contingent as to liability. Focus has not sustained its burden of going forward to rebut petitioning creditors' evidence sufficiently to create a triable issue on any of (1)-(4). The *Celotex* trilogy states that a scintilla of evidence is not enough to avoid a summary judgment. Focus needed to present more than a "wish and a prayer", and more than a "scintilla" of evidence. More than a declaration of someone like Mr. Selten – who does not have

foundation to make the statements he makes – would be necessary to raise a genuine issue of material fact such that a reasonable trier of fact could conceivably find in Focus' favor on question of whether the millions of dollars of debt that Focus was not paying were in bona fide dispute, or find in Focus' favor on the question of whether the millions of dollars of debt that Focus was not paying were contingent as to liability. Focus' Opposition did NOT contain enough evidence on these issues to reach the standard set by the *Celotex* trilogy as far as sustaining Focus' burden of going forward to rebut the petitioning creditors' evidence sufficiently to show that a genuine issue of triable fact existed, in light of the strong admissions against Focus that Focus' aged payables report, the admissions by Mr. Fields, and the declarations of Mr. Rubin constituted.

17. Eric Selten's declaration is insufficient to rebut either the aged payables report or Mr. Field's admission made in state court. Mr. Selten now claims he was never an employee of Focus, he was only a litigation consultant to Focus who came in after the fact and works at the direction of Focus' attorneys. Thus Mr. Selten cannot lay business records foundation for the records he talks about in his declaration and no one else has laid foundation for these documents.

18. Also, Mr. Selten's declaration, even if one ignores the lack of foundation, does not establish that even a single one (much less a substantial number or dollar amount) of the creditors listed in the aged payables report is NOT owed a substantial amount, even if one assumes – as Mr. Selten claims – that some amounts are overstated. That claim is just argument, and Mr. Selten lacks foundation to make it. He wasn't there at the time, he was never an employee of Focus, he says in his latest declaration.

19. Mr. Rubin's (then the chief executive officer of Focus) declarations filed in state court dated April __ 2000 and 6/14/00 do NOT help Focus, they help petitioning creditors and are a third admission of amounts owed by Focus to creditors, without there being any claim of bona fide dispute made in either Rubin declaration.

20. For example, on p. 20 of the Rubin April __ 2000 declaration at lines 12-16, Rubin states: "Focus Media has not paid the invoices from NBC and its stations because NBC and its stations have interfered with Focus Media's ability to collect money from its clients, precluded Focus Media from collecting over $12 million from Sears alone, and left Focus Media with outstanding balances due from it clients that greatly exceed the amount that NBC seeks to attach." No claim is made in that Declaration of Rubin that the debts Focus owes to the TV/radio stations are in bona fide (or any) dispute or that the debts are contingent as to liability. The claim is that Focus doesn't have money to pay because NBC interfered with Focus' clients, getting Focus clients like Sears to not pay Focus, so Focus doesn't have money to pay the TV and radio stations the money Focus owes them. That is a totally different claim than the one Focus is making in defending against this involuntary petition.

21. In Rubin's 6/14/00 declaration, p.17, lines 20-24, Rubin, in describing Focus' long standing contract (which he claims Focus and ABC are still operating) [states]: "the parties agreed that Focus Media would purchase media under the best terms and conditions offered to other advertising and media buying agencies, and that Focus Media's payment and credit terms would be no worse than the most favorable payment and credit terms that other advertising and media buying agencies obtained. The parties also agreed that Focus Media would pay invoices from all stations WITHIN 90

DAYS AFTER RECEIPT of the station invoice, and that disputes over media buys and invoices would be resolved by negotiation and compromise, before any litigation was filed." That is a statement that the invoices were required to be paid within 90 days after presentation, whether or not their [*sic*] was a dispute, which again, is totally contrary to the claim Focus is making in defending against this involuntary petition.

22. Summary adjudication is granted to petitioning creditors against Focus on all affirmative elements of 11 USC §303, pursuant to F.R.Civ.P. Rule 56(d), as incorporated into bankruptcy practice by F.R.B.P. Rule 56 and applicable caselaw.

FOCUS' ALLEGED AFFIRMATIVE DEFENSES TO INVOLUNTARY PETITION, AS TO WHICH FOCUS BEARS BURDEN OF PROOF, BY PREPONDERANCE OF THE EVIDENCE; SUMMARY ADJUDICATION MUST BE GRANTED AGAINST THESE AFFIRMATIVE DEFENSES UNLESS FOCUS DEMONSTRATES THAT A TRIABLE ISSUE OF FACT EXISTS REGARDING THE AFFIRMATIVE DEFENSE IN ISSUE [F.R.Civ.P. Rule 56(a), (c), (d), incorporated into bankruptcy practice by F.R.B.P. Rule 7056 and Caselaw]:

23. Under Federal Rule of Bankruptcy Procedure 7056(e), affirmative defenses have to be proved by the party claiming them, so the burden of proving the alleged affirmative defenses of "bad faith" and "unclean hands of petitioning creditors" is on Focus, the party claiming those affirmative defenses apply. After the *Celotex* trilogy, a wish and a prayer is no longer enough to get by a motion seeking summary adjudication AGAINST alleged affirmative defenses. Under this standard, to defeat a motion seeking summary adjudication against an affirmative defense, the party asserting the

affirmative defense has to present, in opposition to the motion, enough evidence proving that affirmative defense esits [*sic*] to create a genuine issue of triable issue of fact regarding that affirmative defense. This means presenting enough evidence establishing that affirmative defense that a reasonable trier of fact could reasonably find in Focus' favor on the affirmative defense. There is no evidence presented by Focus as to any acts or failures to act by the interim trustee. Therefore, the Court finds that Focus has not met its burden of showing a genuine triable issue exists as to its alleged defense of failures to act by the interim trustee; and the Court grants summary adjudication to petitioning creditors, pursuant to Rule 56, against the alleged affirmative defense of "failures to act/misfeasance by the interim chapter 7 trustee."

24. The only affirmative defenses where Focus has presented sufficient evidence to avoid having summary adjudication AGAINST the affirmative defense is the alleged affirmative defense of "bad faith" by ABC. The same facts might also be cast as supporting the alleged affirmative defense of "unclean hands by petitioning creditors". Consequently, the Court denies summary adjudication to petitioning creditors regarding Focus' two alleged affirmative defenses of bad faith and unclean hands, leaving these two affirmative defenses ONLY for trial.

DATED: September 24, 2001

/s/ Kathleen P. March
KATHLEEN P. MARCH
United States Bankruptcy Judge

In re (short title)	Chapter 7 Case Number:
Focus Media, Inc. Debtor	LA00-38197KM

NOTICE OF ENTRY OF JUDGMENT OR ORDER AND CERTIFICATE OF MAILING

TO ALL PARTIES ON THE ATTACHED SERVICE LIST:

1. You are hereby notified, pursuant to Local Bankruptcy Rule 9021-1(v), that a judgment or order entitled (*specify*):

FINDINGS OF FACT AND CONCLUSIONS OF LAW ON PETITIONING CREDITORS' MOTION FOR SUMMARY JUDGMENT/SUMMARY ADJUDICATION ON INVOLUNTARY PETITION IN BANKRUPTCY

was entered on (*specify date*): SEP 25 2001

2. I hereby certify that I mailed a copy of this notice and a true copy of the order or judgment to the persons and entities on the attached service list on (*specify date*):

SEP 25 2001

DATED: SEP 25 2001

JON D. CERETTO
Clerk of the Bankruptcy Court

By: /s/
Deputy Clerk

SERVICE LIST

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Attorneys for Petitioning Creditors

ENTERED
DEC 14 2001
CLERK, U.S. BANKRUPTCY COURT
CENTRAL DISTRICT OF CALIFORNIA
BY _____ DEPUTY CLERK

FILED
DEC 14 2001
CLERK, U.S. BANKRUPTCY COURT
CENTRAL DISTRICT OF CALIFORNIA
BY _____ DEPUTY

UNITED STATES BANKRUPTCY COURT
CENTRAL DISTRICT OF CALIFORNIA
LOS ANGELES DIVISION

In re:

FOCUS MEDIA, INC.,
Respondent.

NATIONAL BROADCASTING COMPANY, INC.; ABC, INC.; AND PAXSON COMMUNICATIONS, INC.,
Petitioning Creditors,

v.
FOCUS MEDIA, INC.,
Respondent.

Case No. LA 00-38197-KM
Involuntary Chapter 7

~~[PROPOSED]~~ FINDINGS OF FACT AND CONCLUSIONS OF LAW RE: TRIAL ON REMAINING ISSUES ON INVOLUNTARY PETITION

Trial Date:
Date: October 18-20, 2001
Time: 9:00 a.m.
Place: Courtroom 1468

Hon. Kathleen P. March
Edward R. Roybal Center
255 E. Temple Street
Los Angeles, CA 90012

Pursuant to the Pretrial Order entered on October 9, 2001 (the "Pretrial Order"), the trial on the first phase of the remaining issues of Focus Media, Inc.'s affirmative defenses of bad faith and unclean hands was held on October 18-20, 2001 before the Honorable Kathleen P. March, United States Bankruptcy Judge. Maurice Wainer of Snipper, Wainer & Markoff, LLP and Geoffrey Mousseau of Mousseau & Associates appeared for Focus Media, Inc. ("Focus"), and Howard J. Steinberg, Bruce A. Wessel, Sean K. Lokey of Irell & Manella LLP appearing for Petitioning Creditors, including

ABC, Inc. Based on the testimony of the witnesses and the material admitted into evidence the Court makes the following findings of fact and conclusions of law:

PROCEDURES FOR TRIAL

1. As set forth in detail in the Pretrial Order, the issues left for trial in this case were Focus' affirmative defenses of alleged bad faith and/or unclean hands by Petitioning Creditor ABC, Inc.

2. The Respondent Focus had the burden of proving such affirmative defenses by a preponderance of the evidence.

3. The trial was governed by the Pretrial Order, which established a bifurcated trial schedule.

4. The first phase of trial was set for October 18, 2001 to determine whether ABC, Inc. was a proper entity to be a petitioning creditor in this case under 11 U.S.C. § 303(b)(1) which allows an involuntary case to be commenced by three or more entities, each of which is the holder of a claim against the respondent that is not contingent as to liability or the subject of a bona fide dispute, if such claims aggregate at least $10,775 more than the value of any lien on the property of the debtor securing such claims held by the holders of such claims.

5. The second phase of trial was set for October 26, 2001, if needed, and would be reached only if the Court determined that ABC, Inc. was not a proper entity to be a petitioning creditor under 11 U.S.C. § 303(b)(1) at the first phase of the trial. In the event that ABC, Inc. was not a proper petitioning creditor, then as part of determining the bad faith defense, the Court would have to reach the issue of the state of mind of ABC, Inc., *i.e.* whether ABC, Inc. knew it

was not eligible to be a petitioning creditor but still proceeded in filing the involuntary petition; whether ABC, Inc. was reckless about whether it was entitled to be a petitioning creditor but still proceeded in filing the involuntary petition; whether ABC, Inc. was negligent about whether it was entitled to be a petitioning creditor but still proceeded in filing the involuntary petition; or whether ABC, Inc. was not even negligent in filing the involuntary petition.

6. The first phase of trial on the question of whether ABC, Inc. was a proper petitioning creditor, was tried on October 18-20, 2001.

7. Though the Pretrial Order allotted four hours for each side to present their case, because of the plea of Focus counsel that Focus needed more time, Focus was allowed to present its case over 9 hours and 49 minutes, causing the proceedings to run late into the evening on Friday October 19, 2001. Petitioning Creditors used 8 hours and 19 minutes to present their case. The Court wanted to give every opportunity for the parties to present evidence and that is why the Court did not cut off questioning that was at best marginally relevant. At the request of Focus, the Court ordered Robert Iger, the chief executive officer of ABC, Inc. to fly from New York to testify at the trial, as well as another senior executive Walter Liss.

FINDINGS OF FACT

Findings As To ABC, Inc.'s Ownership of WTVD-TV, WKHX-FM &WYAY-FM

8. ABC, Inc. is and was at the time it filed as a petitioning creditor in October 2000 a proper entity to be a petitioning creditor pursuant to 11 U.S.C. § 303(b)(1) because

ABC, Inc. directly owned television and radio stations that were creditors of Focus. Those stations included WTVD-TV, WKHX-FM Radio, and WYAY-FM Radio.

9. Griffith Foxley testified to the corporate structure of ABC, Inc.

10. Exhibit 466 was admitted as a business record of ABC, Inc. and explained by Mr. Foxley.

11. Exhibit 466 and Mr. Foxley's testimony show that there are television stations directly owned by ABC, Inc., including WTVD-TV. The evidence also shows that there are seven television stations that are separately incorporated subsidiaries of ABC, Inc. The evidence also shows there are radio stations directly owned by ABC, Inc., including WKHX-FM and WYAY-FM, as well as radio stations that are separately incorporated subsidiaries of ABC, Inc.

12. One of the most reliable forms of evidence are documents filed with federal agencies because entities are required to file those documents by law and because lying to federal agencies is a crime.

13. Exhibit 465 in evidence is an FCC ownership report obtained by Phillip Corwin, an attorney retained by Focus to go to the FCC to obtain documents showing the ownership of the stations. Exhibit 465, the ownership report for commercial broadcast stations, lists numerous stations that are owned by ABC, Inc., including the stations WTVD-TV, WKHX-FM, and WYAY-FM, and did not support Focus' contention that ABC, Inc. did not own these stations.

14. Exhibit 465, filed with the FCC, is a document that was not filed with this dispute in mind, but was filed for FCC

licensing purposes. That document reflects that WTVD-TV, WKHX-FM, and WYAY-FM are directly owned by ABC, Inc. consistent with Mr. Foxley's testimony.

15. Additionally, there was admitted into evidence a public record from the State of North Carolina, Exhibit 1209, showing that WTVD-TV is a "dba" for ABC, Inc. in North Carolina.

16. The Court finds that the three stations WTVD-TV, WKHX-FM, and WYAY-FM are owned by ABC, Inc. Indeed, Focus did not present any persuasive evidence that these three stations are not owned by ABC, Inc. Witnesses called by Focus in its case in chief, Messrs. Foxley and Corwin, supported ABC, Inc.'s contention that it owns these stations directly.

Findings As To The ABC-Related Entities That Joined As Petitioning Creditors

17. There was testimony at trial that certain of the stations that filed joinders in this case as petitioning creditors were and are separately incorporated subsidiaries of ABC, Inc.

18. It was argued by Focus during the case and in closing argument that there was something wrong with these separate corporations joining in the petition.

19. There was agreement in this case between the Petitioning Creditors and Focus that debts that Focus owed to separately incorporated television and radio stations, even if subsidiaries of ABC, Inc., could not properly be claimed as debt by ABC, Inc. for purposes of being a petitioning creditor.

20. In the Court's view, this stipulation accurately reflects the law absent a legally valid assignment. All documentation here showed that there was no assignment or transfer of the claims of the subsidiaries to ABC, Inc. There were no documents evidencing a written transfer. The box on the petition or the amended petition was not checked for ABC, Inc. based on the attachment. The box was checked for NBC, Inc., one of the other Petitioning Creditors.

21. The testimony of Ms. Tanya L. Menton was that there were no written transfers or oral transfers of the claims of the subsidiaries to ABC, Inc. Ms. Menton did say, in connection with ABC, Inc. providing legal services to the subsidiaries, that she thought that the subsidiaries wanted her to collect the debt. There was no evidence from the subsidiaries themselves and no evidence that any representative of a subsidiary with authority to do so took steps to assign claims to ABC, Inc. Ms. Menton did state at one point that in her opinion she thought they were transferred, but the evidence is that there was no oral request for transfer. Nobody testified to there being an oral or written request for transfer. Ms. Menton's feeling that those entities wanted ABC, Inc. to collect the debt from Focus falls far short of there being a legally valid transfer or an assignment from the subsidiaries to ABC, Inc. Moreover there was no testimony about any particular subsidiary.

22. The Court heard nothing at the trial that would lead the Court to change its prior ruling <u>(i.e., the ruling that the separate corporations that filed joinders as Petitioning Creditors were proper petitioning creditors)</u>.[1] Moreover no such arguments were raised by Focus in opposition to the

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[1] Underscored text followed by (initial K) at end of paragraph indicates handwritten interlineations by Bankruptcy Judge.

summary judgment motion filed by those entities. The finding made by the Court is consistent with the agreement of the parties that separately incorporated subsidiaries of ABC, Inc. should file their own claims as separate creditors. (initial K)

Findings As To Focus' Entity Argument

23. Focus argued at trial (but not previously in the case) that where 11 U.S.C. § 303(b)(1) says that an involuntary petition can be commenced by three or more entities, that separately incorporated corporations should be considered a single entity.

24. Focus did not file a pretrial brief. In closing argument, Focus cited only four bankruptcy cases – *In re Arriola Energy Corp.*, 74 B.R. 784 (S.D. Tex. 1987), *In re Averil, Inc.*, 33 B.R. 562 (Bankr. S.D. Fla. 1983), *In re Nazarian*, 5 B.R. 279 (Bankr. D. Md. 1980), *In re Camelot, Inc.*, 19 B.R. 910 (Bankr. E.D. Tenn. 1982). None of the cases cited support the proposition as claimed by Focus that where 11 U.S.C. § 303(b)(1) says that an involuntary petition can be commenced by three or more entities, that separately incorporated corporations are considered a single entity. There is no case law to that effect and the definitions in 11 U.S.C. § 101 that Focus cited to do not support this interpretation. Moreover, this argument was not raised by Focus in opposing the summary judgment motion or in any pretrial proceeding. It was not in the pretrial order as an issue to be addressed at trial.

25. 11 U.S.C. § 101 provides that "entity" includes person, estate, trust, governmental unit and United States Trustee. It does not say "entity" means subsidiaries of a parent. It does not say separate corporations are a single entity. There is no authority for Focus' argument.

26. The Court finds that ABC, Inc. was a proper entity to be a petitioning creditor for, and only for, the debt that was owed to television and radio stations that were directly owned by ABC, Inc. which include WTVD-TV, WKHX-FM, and WYAY-FM.

Findings As To Amounts Owed ABC, Inc.

27. Cathy Jones testified about Exhibit 1081, which was admitted in evidence. Exhibit 1081 shows that at least $9,388 was owed by Focus to WTVD-TV. Ms. Jones testified that it was her job to supervise efforts to collect the debt owed the eight stations listed on Exhibit 1081. Those eight stations included WTVD-TV. WTVD-TV is directly owned by ABC, Inc.

28. Ms. Jones was cross-examined thoroughly about the fact that there were some checks from Focus showing a payment of $5,265 for WTVD-TV for advertising time. Ms. Jones was asked why $5,265 was still shown on a list as still owed. Ms. Jones explained that this was because the total debt for that month was $10,530, and half of that amount was paid, while the other half was never paid. This was why the amount on the check and the amount still unpaid matched.

29. For two other stations directly owned by ABC, Inc., WKHX-FM and WYAY-FM, through Federal Rule of Evidence 902(11), the Declaration of Lynn Wilhelm was admitted in evidence with documents authenticated as Exhibit 1218. In Exhibit 1218, there are business records and invoices for WKHX-FM and WYAY-FM, showing $12,452 owed by Focus to WYAY-FM and $26,687.50 owed by Focus to WKHX-FM.

30. The three figures of amounts owed by Focus to WTVD-TV, WKHX-FM, and WYAY-FM total approximately $50,000.

31. This amount, $50,000, is not $1.5 million or anything like it, but even $50,000 is a more than the $10,775 dollar limit which is to be the aggregate for the three petitioning creditors pursuant to 11 U.S.C. § 303(b)(1). ABC, Inc. was owed the amounts set forth above by Focus because its directly owned stations, WTVD-TV, WKHX-FM, and WYAY-FM, were shown to be owed those amounts.

Findings About Whether There Was A Bona Fide Dispute or Whether The Debts Were Contingent As To Liability

32. Pursuant to 11 U.S.C. § 303(b)(1), the Court examined the question of whether the amounts owed by Focus to ABC, Inc. were contingent as to liability or were in bona fide dispute. On that issue, the Court makes several findings.

33. First, Focus' accounts payable/aged payable register, Exhibit 1037 in evidence, shows amounts owed that are over 90 days past due for WTVD-TV, WKHX-FM, and WYAY-FM as of March 30, 2000. This shows that undisputed debts were owed ABC, Inc.

34. Second, the admissions of Tom Rubin, at the time that he was the highest officer of Focus, in declarations admitted into evidence pursuant to Federal Rule of Evidence 801(d) as admissions of a party opponent support this finding. Those declarations make no argument that the debts owed were contingent as to liability or subject to a bona fide dispute. To the contrary, Mr. Rubin admits that the amounts were owed, that they should have been paid within 90 days, and that

reason Focus was not paying them was because Sears owed money to Focus, in Focus' view.

35. Third, in portions of the transcript admitted into evidence of the state court proceeding between Sears and Focus, Focus' counsel in the state court action Bertram Fields, admitted that Focus owed over $11 million to television and radio stations and that there was no claim that the money was not owed to the television and radio stations. Mr. Fields claimed that it was Sears' conduct that made it not possible for Focus to pay the amounts that Focus owed the stations.

36. Fourth, Cathy Jones testified that she spoke directly to Mr. Sullivan, Focus' Chief Financial Officer. Ms. Jones testified about contemporaneous emails, which corroborated her recollections of her conversations and she testified that those emails accurately reflected her conversations with Focus. Ms. Jones testified that in those conversations to collect the debts owed by Focus to those eight stations shown in Exhibit 1081 in evidence, that there was no claim by Focus that the moneys were not owed. Ms. Jones was asking Focus to pay for advertising run by the eight stations, including WTVD-TV, one of the stations directly owned by ABC, Inc. Ms. Jones testified that there was no claim that there was a bona fide dispute made by Mr. Sullivan. To the contrary, she testified that Focus repeatedly promised that it would pay the amounts owed to these eight stations. For the debts owed for advertising run in October 1999, Focus fully admitted the debt was owed and agreed to pay on a staged schedule of fifty percent on one date and the remaining fifty percent on a later date. Only the first fifty percent payment was made. Focus also said it would pay the November 1999 invoices. Ms. Jones testified that this schedule was moved out to further dates because Focus asked for more time. Ms. Jones testified that the only thing that Focus ever claimed in any of those

conversations was that reconciliations were going on for Universal. It was never claimed that the moneys were not owed or that the debts were in bona fide dispute. The reconciliations were supposed to be done by a Thursday early in February 2000, but the money was not paid. It is clear that Focus did not have the money to pay these debts or did not want to pay its creditors. There was no claim by Focus of a legal reason why the money was not due and owing. The Court found very credible Ms. Jones' testimony that Focus agreed to pay the amounts due and then did not make full payment.

37. Ms. Jones' testimony, the admissions of Focus' state court attorney, Bertram Fields, the accounts payable register of Focus (Exhibit 1037), and Mr. Rubin's admissions in his declarations admitted in evidence that were made during the time he was chief executive officer of Focus, all establish that the debts were not contingent as to liability and that the debts that were owed to ABC, Inc. were not in bona fide dispute. Indeed, debts over 90 days old of over $49 million were owed to creditors as set forth in Focus' aged payables report, Exhibit 1037 in evidence.

38. ABC, Inc. was owed approximately $50,000 through its directly owned stations rather than $1.5 million. An entity does not have to be owed $1.5 million to be a petitioning creditor. An amount of $50,000 is sufficient. Exhibit 401A, the involuntary petition, and 401B, the amended involuntary petition, do state the amount of ABC, Inc.'s claim as $1.5 million, but there is no itemization of the amount anywhere in the petition or the amended petition.

39. Thus, in the Court's view the Petitioning Creditors were free to prove up any debt owed to ABC, Inc. not merely to prove up the eight stations that were listed in Exhibit 1081.

One of the stations on Exhibit 1081 was WTVD-TV. Exhibit 1081 shows WTVD-TV is owed $9,388. That alone could be enough to be a petitioning creditor. Because of this, the Court does not find it necessary to have a continued day of trial to find the state of mind of ABC, Inc. The state of mind of ABC, Inc. was only relevant if ABC, Inc. was not a proper petitioning creditor in this case, but the Court finds that ABC, Inc. was and is a proper petitioning creditor in this case.

Credibility Of Witnesses

40. The Court carefully observed the witnesses that testified.

41. The Court finds that Ms. Jones' credibility was very good, that everything she said about her conversations with Mr. Sullivan was documented in contemporaneous emails and that her demeanor was good and her testimony meshed with the documents.

42. The Court finds that Mr. Foxley's credibility was good as well.

43. The Court carefully assessed the credibility of Focus' Chief Financial Officer, Thomas Sullivan, and finds that Mr. Sullivan's credibility was extremely bad because he was impeached o almost every element of his testimony.

44. Mr. Sullivan testified on direct examination trying to establish whether there was a bona fide dispute as to the amounts that were owed to ABC, Inc. and the other creditors. Mr. Sullivan gave a detailed story that he needed documents such as traffic tickets, certified affidavits that the ads had run, traffic logs, and other documents to be able to pay the bills, and that he had not received those documents.

45. Mr. Sullivan painted himself in his direct testimony as being an extremely careful, fastidious and compulsive person about trying to make sure that every shred of documentation that could possibly be had was had, to determine whether the amounts should be paid to ABC, Inc. and to the other television and radio stations to whom Focus owed money.

46. Mr. Sullivan was utterly impeached as to this testimony on cross-examination because he authorized, as the Chief Financial Officer of Focus, before the filing of the involuntary petition, $25 million in payments to be made by Focus to Focus' sole shareholder, even though at that time Focus was not paying its creditors as their debts came due, according to all of the evidence that we have in this trial, including Focus' own accounts payable register, Exhibit 1037 in evidence.

47. Mr. Sullivan admitted he authorized $25 million in payments to Thomas Rubin in the year 2000, of which he testified that $14 million was paid so that Mr. Rubin could pay his taxes, which is contrary to the law because a Subchapter S corporation is not liable to pay the personal taxes owed by the shareholder of the S corporation. (initial K)

48. Mr. Sullivan testified that he was a certified public accountant that had over 25 years of experience and that he worked for Focus for a long time as its Chief Financial Officer. Mr. Sullivan should have certainly been aware of the tax laws relating to a Subchapter S corporation, but he paid out $14 million to Mr. Rubin so that Mr. Rubin could pay Mr. Rubin's taxes, and he paid out an additional $11 million. At best, the $14 million must be viewed as a distribution by Focus to its shareholder Rubin. However, per California Corporation Code §501, it is unlawful for a California corporation (Focus

is a California corporation) to pay a dividend to shareholders if doing so [remainder of sentence is not legible]. (initial K)

49. Of that $11 million, Mr. Sullivan testified that approximately $600,000 to $700,000 was salary to Mr. Rubin, $3 million was claimed to be a severance paid to Mr. Rubin, and $2 million was claimed to be a draw by Mr. Rubin but was later identified by Mr. Sullivan as being a shareholder's distribution by Focus to Mr. Rubin. As to the remaining $5 million plus, Mr. Sullivan was completely unable to give any explanation whatsoever for why it was paid to Mr. Rubin, even when the Court pressed him to see if maybe he could come up with some explanation for this transfer. So at least $7.4 million of this additional $11 million was also, at best, an illegal dividend to shareholder Rubin, paid in violation of California Corporation Code §501. (initial K)

50. This $5 million plus does not appear, without any explanation being given, to have been paid to Mr. Rubin for any legal or legitimate purpose whatsoever. So, Mr. Sullivan paid out $5 million and cannot even remember what for, but he painted himself as being ever so fastidious about checking documentation for the television and radio ads that ran prior to paying their bills. The Court finds this to be a pathetically unbelievable story. (initial K)

51. The Court drew no inference from the fact that Mr. Sullivan repeatedly asserted the Fifth Amendment in response to questioning about transfers from Focus and the veracity of sworn statements he made to the Court. The Court's understanding of California law is that there is a California Evidence Code statute that states that no inference is supposed to be drawn against the witness, even in civil proceedings. In any even, the Court did not draw an inference against any party because of Mr. Sullivan's decision to

exercise his Fifth Amendment rights.

52. Additionally, as to Mr. Sullivan's credibility, various declarations of Mr. Sullivan filed with the Court and Mr. Sullivan's complaint filed with the Ninth Circuit have statements in them that were not true.

53. The Court observed carefully Mr. Sullivan's demeanor on the witness stand and found his demeanor to be bad and his testimony not credible. (initial K)

54. Overall, the Court disbelieved almost everything that Mr. Sullivan had to say, except the Court believes his testimony that he is a certified public accountant ("CPA"). However, it seems unlikely that a CPA who has practiced for 25 years working with a Subchapter S corporation would not be aware that a corporation cannot pay a shareholder distribution when a corporation is unable to pay its creditors. Creditors have the right to be paid first. That Mr. Sullivan would be clueless about the tax laws so that he would have handed out $14 million to Mr. Rubin that is not even claimed to have been salary, so that Mr. Rubin could pay Mr. Rubin's personal taxes, without knowing it was illegal for Focus to pay Rubin those amounts, is not credible. It is a sad performance, and an illegal performance from what the Court can tell, in light of applicable California law. (initial K)

Focus' Equitable Lien Argument

55. There is no evidence that any of the $49 million in debt owed to any of the hundreds of creditors of Focus was secured, including debt owed to any of the Petitioning Creditors. The evidence was that all of this debt was unsecured. There is no evidence of a security document whatsoever.

56. The argument was made by Focus that in the state court action where Sears was suing Focus, to which ABC, Inc. was not a party, the state court judge ruled that there was an equitable trust or equitable lien and thus ABC, Inc. is collaterally estopped from asserting that their claim is not secured. Such a ruling could possibly be collateral estoppel against Focus, but it is not collateral estoppel against ABC, Inc. because ABC, Inc. was not a party to that litigation and not in privity to any party in that litigation. Focus' argument is wrong as a matter of law. As a factual matter, Focus and Tom Sullivan personally were held in contempt of Court for dissipating Focus' assets before the involuntary filing occurred. It is hypocritical for Focus' counsel to argue the debt was secured because of the state court asset freeze order (injunction) when Focus was held in contempt of Court for violating that asset freeze order (injunction). Most of the assets of Focus, in violation of the state court order, had been transferred to insiders prior to the filing of the involuntary petition. (initial K)

57. There was no evidence supporting Focus' argument that the debt owed to ABC, Inc. was secured. No witness testified the debt was secured and no documents in evidence support that contention.

Testimony by Robert Iger And Walter Liss

58. Messrs. Robert Iger and Walter Liss testified at trial. Messrs. Iger and Liss both testified that they were not lawyers, and that neither one knew the legal structure of the corporations at issue because they left to in-house lawyers like Mr. Foxley the task of keeping track of the legal structure of the company. Though the Court ordered ABC, Inc. to bring Messrs. Iger and Liss to trial to testify, after hearing that testimony it is the Court's view that their testimony was

almost totally irrelevant to these proceedings and practically useless in addressing the issues before the Court.

Piercing The Corporate Veil As To Subsidiary Corporations' Claims

59. The Court finds that even if there had not been, through stipulation of the parties, an agreement that the debt of subsidiaries was not proper debt for ABC, Inc. to claim, that that is the law, absent a showing of ignoring corporate formalities and other required evidence as would allow piercing of the corporate veil.

60. Focus did *not* make the argument as to piercing the corporate veil. There is no evidence that these corporations did not observe corporate formalities. No one has even suggested that a huge corporation like ABC, Inc., which has the typed up minutes signed by three corporate officers in evidence, did not comply with corporate formalities. Nobody has even suggested that these corporations like The Walt Disney Company, ABC, Inc., and the separately incorporated subsidiaries did not observe corporate formalities. In fact, the evidence is to the contrary. These companies make SEC filings and file 10K's and 10Q's. They have annual reports, several of which are in evidence. They have FCC filings and filings with various Secretaries of State.

61. In light of the fact that ABC, Inc. was a proper entity to be a petitioning creditor in this involuntary case pursuant to 11 U.S.C. § 303(b)(1), the Court finds it unnecessary to reach the question of ABC, Inc.'s state of mind. Thus, there is no need to have a continuation of the trial on this issue as scheduled on October 26, 2001 because ABC, Inc. was a proper petitioning creditor owed a debt by Focus that was not subject to any contingency or dispute.

62. It is the judgment of the Court after trial that an order for relief shall enter in this involuntary case, as all elements necessary to entry of order for relief per 11 U.S.C. § 304 have been proven by a preponderance of the evidence, and as there is no valid affirmative defense to the involuntary petition. (initial K)

CONCLUSIONS OF LAW

1. Determining whether the order for relief should be entered is part of the core jurisdiction of the bankruptcy court.

2. Respondent Focus had the burden of proving its affirmative defenses of bad faith and unclean hands by a preponderance of the evidence.

3. Focus has failed to prove its affirmative defenses by a preponderance of the evidence. There was no persuasive evidence presented to support Focus' principal claim that WTVD-TV, WYAY-FM, and WKHX-FM are not owned by ABC, Inc. None of the witnesses identified by Focus to testify to support this claim testified as Focus said they would. To the contrary, these witnesses testified either that ABC, Inc. did own the stations, or that they simply did not know the name of the corporate entity that owned the stations.

4. In the event that ABC, Inc. was not a proper petitioning creditor, then as part of determining the bad faith defense, the Court would have to reach the issue of the state of mind of ABC, Inc., that is whether ABC, Inc. knew it was not eligible to be a petitioning creditor but still proceeded to file the involuntary petition or whether ABC, Inc. was reckless about whether it was entitled to be a petitioning creditor but still proceeded to file the involuntary petition. Because ABC, Inc. was a proper petitioning creditor, the Court need not

address these questions. Because ABC, Inc. was a proper petitioning creditor, by definition the proceeding was filed in good faith.

5. The stipulation between the Petitioning Creditors and Focus that debts that Focus owed to television and radio stations that were owned by separate corporations, subsidiary corporations of ABC, Inc., could not properly be claimed as debt by ABC, Inc. for purposes of being a petitioning creditor, accurately reflects the law absent an assignment or transfer. Even if there had not been, through stipulation of the parties an agreement that the debt of subsidiaries was not proper debt for ABC, Inc. to claim, that is the law, absent a showing of such ignoring of corporate formalities as would allow piercing of the corporate veil.

6. The Court was presented with no authority for Focus' argument that where 11 U.S.C. § 303(b)(1) says that an involuntary petition can be commenced by three or more entities that separately incorporated corporations should be considered a single entity. Focus cited four bankruptcy cases: *In re Arriola Energy Corp.*, 74 B.R. 784 (S.D. Tex. 1987), *In re Averil, Inc.*, 33 B.R. 562 (Bankr. S.D. Fla. 1983), *In re Nazarian*, 5 B.R. 279 (Bankr. D. Md. 1980), *In re Camelot, Inc.*, 19 B.R. 910 (Bankr. E.D. Tenn. 1982). None of the cases cited support the proposition as claimed by Focus that where 11 U.S.C. § 303(b)(1) says that an involuntary petition can be commenced by three or more entities, that separately incorporated corporations would be considered a single entity. There is no case law to that effect and the definitions in 11 U.S.C. § 101, that Focus cited to did not appear to bear this interpretation out. 11 U.S.C. § 101 says "entity" includes person, estate, trust, governmental unit and United States Trustee. It does not say "entity" means subsidiaries of a parent. It does not say separate corporations are to be treated

as a single entity. Nor did Focus raise this argument in opposition to the summary judgment motion or in any pretrial proceeding. Thus on summary judgment the Court has already ruled that the subsidiaries are proper petitioning creditors. Indeed Focus' position then was that only the subsidiaries could file claims, not the parent corporation, ABC, Inc.

7. The argument was made by Focus that in the state court action where Sears was suing Focus, to which ABC, Inc. was not a party, that the state court judge ruled that there was an equitable trust or equitable lien and thus ABC, Inc. is collaterally estopped from asserting that their claim is not secured. Such a ruling could possibly be collateral estoppel against Focus, but it is not collateral estoppel against ABC, Inc. because ABC, Inc. was not a party to that litigation and not in privity to any party in that litigation. That argument is wrong as a matter of law. As a factual matter, the record reflects that Focus [and] Thomas Sullivan were held in contempt of court by the state court for violating the state court asset freeze order (injunction) and dissipating the assets of the company. Because of this unlawful dissipation of assets, there was little or no money being held for creditors by Focus as of the date of the filing of the involuntary petition. (initial K)

Dated: Dec. 14, 2001

/s/ Kathleen P. March
HON. KATHLEEN P. MARCH
United States Bankruptcy Judge

Presented by:

Dated: November 21, 2001

IRELL & MANELLA LLP
Henry Shields
Howard J. Steinberg
Bruce A. Wessel
Sean K. Lokey

By: /s/ Bruce A. Wessel
Bruce A. Wessel
Attorneys for Petitioning Creditors

Approved as to form:

Dated: November __, 2001

MOUSSEAU & ASSOCIATES
Geoffrey Mousseau

By: _____
Geoffrey Mousseau
Attorneys for Focus Media, Inc.

PROOF OF SERVICE

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action. My business address is 1800 Avenue of the Stars, Suite 900, Los Angeles, California 90067-4276.

On November 21, 2001, I served the foregoing document described as [PROPOSED] FINDINGS OF FACT AND CONCLUSIONS OF LAW RE: TRIAL ON REMAINING ISSUES ON INVOLUNTARY PETITION on each interested party, as stated on the attached service list.

☒ (BY FAX) I caused the foregoing document to be served by facsimile transmission to each interested party at the facsimile machine telephone number shown on the attached service list.

Executed on November 21, 2001 at Los Angeles, California.

I certify that I am employed in the office of a member of the bar of this Court at whose direction the service was made.

I declare under penalty of perjury that the foregoing is true and correct.

Susan Dreger
(Type or print name)

/s/ S. Dreger
(Signature)

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Note to users of this form.
Physically attach this form as the last page of the proposed Order or Judgment. Do **not** file this form as a separate document

In re Focus Media, Inc. Debtor	Chapter 7 Case Number: LA00-38197KM

NOTICE OF ENTRY OF JUDGMENT OR ORDER AND CERTIFICATE OF MAILING

TO ALL PARTIES ON THE ATTACHED SERVICE LIST:

1. You are hereby notified, pursuant to Local Bankruptcy Rule 9021-1(a)(1)(E), that a judgment or order entitled (*specify*):

[PROPOSED] FINDINGS OF FACT AND CONCLUSIONS OF LAW RE: TRIAL OF REMAINING ISSUES ON INVOLUNTARY PETITION

was entered on (*specify date*): DEC 14 2001

2. I hereby certify that I mailed a copy of this notice and a true copy of the order or judgment to the persons and entities on the attached service list on (*specify date*):

DEC 17 2001

DATED: DEC 17 2001

JON D. CERETTO
Clerk of the Bankruptcy Court

By: /s/
Deputy Clerk

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APPENDIX E

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
SOUTHERN DIVISION

ENTERED
MAY 1 2003
CLERK, U.S. DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
SANTA ANA OFFICE
BY /s/ (initials) DEPUTY

FILED
CLERK, U.S. DISTRICT COURT
APR 28 2003
CENTRAL DISTRICT OF CALIFORNIA
BY /s/ (initials) DEPUTY

Priority ___
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THIS CONSTITUTES NOTICE OF ENTRY
AS REQUIRED BY FRCP, RULE 77(d).

IN RE FOCUS MEDIA, INC. SA CV 01-1146 AHS
Debtor. BK. LA 00-38197 KM

FOCUS MEDIA, INC.,
Appellant,
v.
NATIONAL BROADCASTING COMPANY, INC.; ABC, INC.; and PAXSON COMMUNICATIONS, INC.,
Appellees.

ORDER: (1) AFFIRMING BANKRUPTCY COURT'S IMPOSITION OF DISCOVERY SANCTIONS AGAINST APPELLANT; (2) AFFIRMING BANKRUPTCY COURT'S DENIALS OF APPELLANT'S MOTIONS TO DISQUALIFY JUDGE; AND (3) AFFIRMING BANKRUPTCY COURT'S GRANT OF APPELLEES' MOTION FOR SUMMARY ADJUDICATION

I.

PROCEDURAL BACKGROUND IN DISTRICT COURT

On December 3, 2001, appellant Focus Media, Inc. (hereinafter Focus Media) filed Notice of Filing Bankruptcy Appeal. On July 15, 2002, appellant filed its opening brief, urging on appeal that the Bankruptcy Court's orders (1) imposing a preclusionary order as a discovery sanction, (2) denying motions to disqualify itself, and (3) granting summary adjudication in favor of petitioning creditors should be reversed. On August 2, 2002, appellees filed their brief. Appellant filed its reply brief on August 9, 2002. Appellees also filed a Request for Judicial Notice. The appeal was heard on the Court's February 3, 2003 hearing calendar.

Having considered the foregoing, along with the arguments of counsel and the Court's independent research, the Court affirms the Bankruptcy Court's orders granting preclusionary sanctions, denying Focus Media's motions to disqualify the assigned judge, and granting appellees' motion for summary adjudication.

II.

PROCEDURAL HISTORY IN BANKRUPTCY COURT

On October 6, 2000, appellees herein, National Broadcasting Company, Inc. (hereinafter NBC), ABC, Inc. (hereinafter ABC), and Paxson Communications, Inc. (hereinafter Paxson) (collectively hereinafter appellees), filed an Involuntary Petition for Chapter 7 Bankruptcy against Focus Media. The petition was joined by WLS-TV, KGO-AM Radio, KTRK-TV, WABS-TV, and KGO-TV on January 19, 2001 (collectively with appellees, petitioning creditors).

On October 24, 2000, Sears Roebuck & Co. (hereinafter Sears) filed a Motion for Relief from Automatic Stay. On October 25, 2000, Sears filed, in the alternative, a Motion for Appointment of Interim Trustee. On October 27, 2000, the Bankruptcy Court issued an order Granting Motion for Appointment of Interim Trustee.

On November 13, 2000, Focus Media filed a Motion to Disqualify Judge. Petitioning creditors filed opposition on December 5, 2000. The motion was heard on December 27, 2000, and denied on January 10, 2001. On July 18, 2001, Focus Media filed a Motion to Disqualify Judge Kathleen P. March. Petitioning creditors filed opposition on August 16, 2001. Focus Media filed a reply on August 18, 2001. The motion was heard on August 21, 2001. The Bankruptcy Court denied the motion on September 24, 2001.

On December 8, 2000, Focus Media filed a Motion for Summary Judgment on Involuntary Bankruptcy Petition. The motion was heard on January 24, 2001, and denied on February 2, 2001.

On August 1, 2001, petitioning creditors filed a Motion for Summary Judgment re Involuntary Petition. Petitioning creditors argued that the involuntary petition should be granted because the creditors were owed over $10,775, were not being paid as the debts came due, and that said debts were not subject to *bona fide* dispute. Focus Media filed opposition on August 14, 2001. Petitioning creditors filed a corrected reply on August 24, 2001. Focus Media filed a supplemental filing on August 28, 2001. The matter was heard on August 28, 2001. The Bankruptcy Court granted in part and denied in part petitioning creditors' motion on September 24, 2001. The court granted the motion insofar as it ruled that seven of the eight petitioning creditors were owed debts that were not being paid and that such debts were not subject to *bona fide* dispute. However, the Court declined to rule on the alleged debt of petitioning creditor ABC or Focus Media's claim of bad faith filing against ABC. These latter issues were set over for trial.

III.

DISCUSSION

A. Involuntary Bankruptcy

This appeal challenges the proceedings above enumerated and the partial summary adjudication of an involuntary bankruptcy petition. Appellees NBC, ABC, and Paxson filed an involuntary petition for Chapter 7 bankruptcy against appellant Focus Media, which petition was litigated for almost one year.

Title 11 U.S.C. Section 303 allows petitioners to impose bankruptcy on an alleged debtor against that debtor's will. If the alleged debtor has more than twelve total creditors, the

petitioners must show that there are:

1) three qualified petitioning creditors (11 U.S.C. § 303(b)(1));

2) with claims aggregating at least $10,775 (11 U.S.C. § 303(b)(1));

3) which claims are not subject to *bona fide* dispute (11 U.S.C. § 303(b)(1));

4) in which case the court shall order relief against the debtor only if that the debtor is not paying debts as they become due (unless such debts are the subject of a *bona fide* dispute). 11 U.S.C. § 303(h)(1).

NBC, ABC, and Paxson initially filed the involuntary petition on October 6, 2000. (R. Vol. 1, Ex. 1.)[1] Five additional creditors joined the petition, as allowed under 11 U.S.C. § 303(c), on January 19, 2001. (R. Vol. 4, Exs. 11-14.)

Federal Rule of Bankruptcy Procedure 1013(a) states, "The court shall determine the issues of a contested petition at the earliest practicable time and forthwith enter an order for relief, dismiss the petition, or enter any other appropriate order."

---

[1] Following the conventions adopted by the parties, this Order's references to the record provided by appellant are designated as follows: Record Vol. #, Exhibit/Transcript at page: R. Vol. #, Ex. (Tr.) # at xxxx. References to the record provided by appellees is designated as follows: Appellees' Appendix Vol. #, Exhibit/Transcript at page: AA Vol. #, Ex. (Tr.) # at ####.

The Bankruptcy Court's preclusionary sanction challenged on appeal by Focus Media applies to element four above. The Bankruptcy Court's grant of summary judgment in favor of the petitioning creditors and challenged herein by Focus Media concerns elements one, two and three above, the main attack being directed to the issue of *bona fide* disputed debts.

B. Appellate Record

As a preliminary matter, the Court declines to dismiss the appeal due to an incomplete appellate record.

Appellees correctly point out that Focus Media failed to provide the Court with a complete record. They argue that the record is insufficient to review the motion for partial summary judgment. However, the inadequacies of the record do not require dismissal. Furthermore, the failure to provide certified transcripts does not, contrary to appellees' argument, require dismissal.

Federal Rule of Appellate Procedure 10(b)(2) states:

> If the appellant intends to urge on appeal that a finding or conclusion is unsupported by the evidence or is contrary to the evidence, the appellant must include in the record a transcript of all evidence relevant to that finding or conclusion.

Failure to provide relevant portions of a transcript may justify dismissal of an appeal. *Syncom Capital Corp. v. Wade*, 924 F.2d 167, 169 (9th Cir. 1991). However, failure to provide the full record does not *require* dismissal unless a full understanding of the issue is impossible. *Id.*

Focus Media has provided most of the transcripts from the proceedings below. Under Fed. R. App. P. 10(a), only the docket entries need be certified. However, Focus Media did not provide a transcript of the August 28, 2001 hearing on the motion for summary judgment, which is relevant to its appeal of the partial granting of that motion. Focus Media also failed to provide a copy of the Bankruptcy Court's conclusions of law issued in support of granting the petitioning creditors' motion for summary judgment.

Appellees, on the other hand, did supply the Bankruptcy Court's Findings of Fact and Conclusions of Law in support of the partial grant of petitioning creditors' motion for summary judgment and a transcript of the August 28, 2001 hearing. The record is sufficiently complete so as to permit review of the Bankruptcy Court's decision.

The Court grants appellees' request for judicial notice, except as to Exhibits 3 and 7 submitted with the Request for Judicial Notice, which items are the subject of objection by Focus Media and which objections are sustained.

C. Preclusionary Sanctions

1. Introduction

At the hearing on June 5, 2001, the Bankruptcy Court ordered a preclusionary sanction against Focus Media for repeated failures to provide discovery and repeated failures to comply with the Bankruptcy Court's orders thereon. The court determined that, "One, Focus was not paying its debts as they came due shortly before and at the time of the involuntary and, two, that Focus was not paying debts owed to the Petitioning Creditors as those debts became due shortly before and at the time the involuntary was filed." (R. Vol. 17:

6/5/01 Tr. at 6738.) The court declined to adjudicate the question of *bona fide* dispute against Focus at that time.

Focus Media contends that the Bankruptcy Court steered the record and the evidence to ensure that the involuntary petition against Focus Media would be sustained. Focus Media asserts that it complied with the discovery orders to the best of its ability and to the extent that records were in its possession or control, and that, consequently, the Bankruptcy Court's sanction was abusive.

Appellees argue that, in the context of the entire record, there was no prejudice resulting from the sanction: even if erroneous, the evidentiary ruling is not reversible because it would not have affected the outcome. Furthermore, appellees argue that the sanction was justified because Focus Media failed to meet its discovery obligations and to comply with the Bankruptcy Court's orders.

2. Legal Standards

Discovery sanctions are reviewed for an abuse of discretion. *Rae v. Union Bank*, 725 F.2d 478, 481 (9th Cir. 1984). Federal Rule of Bankruptcy Procedure 7037 incorporated Fed. R. Civ. P. 37 as the governing rule for adversary proceedings in bankruptcy. Under Rule 37(a), a court can designate facts as established if a party fails to obey a court order compelling discovery. Fed. R. Civ. P. 37(b)(2)(A). The court can also preclude a disobedient party from supporting or opposing designated claims. Fed. R. Civ. P. 37(b)(2)(B). An order compelling discovery can be appropriate where a party fails to answer interrogatories, fails to respond to a request for production or permit inspection, or provides incomplete or evasive answers. Fed. R. Civ. P. 37(a)(2) - (3).

The critical question is whether there is evidence in the record that noncompliance was due to willfulness, bad faith, or fault. *See Virtual Vision, Inc. v. Praegitzer Industries, Inc.*, 124 F.3d 1140, 1143 (9th Cir. 1997). Disobedient conduct not shown to be outside the control of the litigant is all that is required to demonstrate willfulness, bad faith, or fault. *Id.* (Citations omitted.)

Entry of default – a sanction more severe than the one imposed by the Bankruptcy Court – has been upheld where there were numerous failures to produce documents which were then produced on the eve of trial. *Valley Engineers, Inc. v. Electronic Engineering Co.*, 158 F.3d 1051 (9th Cir. 1998); *North American Watch Corp. v. Princess Ermine Jewels*, 768 F.2d 1447, 1451 (9th Cir. 1986). Sanctions have also been upheld despite a defense of lack of manpower to comply with an order compelling production and lack of bad faith or willfulness in violating an order. *Virtual Vision, Inc.*, 124 F.3d at 1143; *United States v. Sumitomo Marine & Fire Ins. Co., Ltd.*, 617 F.2d 1365 (9th Cir. 1980).

Focus Media's argument that a trustee's possession of pertinent documents precludes compulsion of discovery is unavailing. Focus Media cites unpublished and foreign circuit authorities which are inapplicable because they present distinguishable factual scenarios and, for that reason, lack persuasiveness.

3. Pertinent Facts

Because of the convoluted discovery process that occurred and the fact-intensive reasoning regarding the preclusionary sanction, the pertinent facts are recited in some detail.

On December 4, 2000, petitioners served a first request for production of documents and interrogatories on Focus Media and the interim trustee seeking 33 categories of documents. (R. Vol. 8, Ex. 57, tab 1.) On December 14, 2000, the Bankruptcy Court ordered Focus Media to respond to the interrogatories by January 4, 2001. (R. Vol. 6, Ex. 46, tab 1.) On January 5, 2001, Focus Media served its response to the request for production, responding to each interrogatory that the records could be inspected where they were stored in their regular course of business. (R. Vol. 6, Ex. 42, tab B.) On January 30, 2001, petitioning creditors' counsel viewed boxes and filing cabinets in Focus Media's recently vacated offices, which were under control of the interim trustee.

On February 6, 2001, Focus Media provided a supplemental response to the first request for documents, which included a declaration from Focus Media's Chief Financial Officer (CFO) Tom Sullivan indicating that Focus Media could not produce the requested documents because it did not have the manpower to comply with the request and suggesting that any records could be opened for inspection. (R. Vol. 6, Ex. 43, tab A.) On February 6, 2001, petitioning creditors filed a motion to compel production and further responses to interrogatories and for sanctions. (R. Vol. 6, Exs. 41 & 42.) On February 14, 2001, the Bankruptcy Court heard and granted the motion to compel, stating that Focus Media had failed to produce documents and that its responses were evasive and incomplete. It ordered Focus Media to respond to the interrogatories no later than February 28, 2001. (R. Vol. 6, Ex. 44.) On February 28, 2001, Focus Media's counsel sent petitioning creditors a letter enumerating its efforts to comply and stating that it could not produce anything additional. (R. Vol. 6, Ex. 46., tab 3.)

On March 28, 2001, petitioning creditors filed a motion to designate facts as established. (R. Vol. 6, Ex. 46.) On March 27-30, 2001, Focus Media's new counsel attempted to review and categorize potentially responsive documents which were stored by the trustee at a warehouse. (R. Vol. 7, Ex. 48, tabs D & E.) On April 2, 2001, Focus Media attempted to deliver a truckload of boxes containing responsive documents to petitioning creditors' counsel. The delivery was refused because it would have required the presence of a security guard with the boxes at all times. The boxes of documents were returned to the warehouse. On April 9, 2001, petitioning creditors' counsel went to the warehouse to review the boxes of documents, but the boxes were unavailable for inspection because they had been returned to storage by the warehousemen.

On April 24, 2001, the Bankruptcy Court held a hearing on petitioning creditors' motion to designate facts. (R. Vol. 17 4/24/01 Tr.) The court found that Focus had failed to comply with the February 14, 2001 order compelling production. However, the court declined to grant the motion, instead ordering the documents – labeled in a manner responsive to the requests and interrogatories – produced to petitioning creditor's counsel by May 1, 2001. (R. Vol. 17, 4/24/01 Tr. at 6613-6614.)

Focus Media produced 973 boxes of documents to petitioning creditors' counsel on April 30, 2001. Petitioning creditors argued that an index labeling the documents in a manner responsive to the requests was not provided; Focus Media contested the absence of an index. However, Focus Media subsequently admitted at a May 8, 2001 hearing that no categorizing index was provided at the earlier date. (R. Vol. 17, 5/8/01 Tr. at 6636.) At the hearing, the Bankruptcy Court ordered that a list indicating which documents and boxes were

responsive to the requests be produced within 24 hours. (R. Vol. 17, 5/8/01 Tr. at 6636.) The petitioning creditors also indicated that they were unable to locate financial documents pertinent to the involuntary petition. The court granted Focus Media until May 18, 2001, to comply with the discovery and to identify essential financial documents. (R. Vol. 17, 5/8/01 Tr. at 6646: 1-6.)

By June 5, 2001, Focus Media had not produced the complete general ledger (only a ledger current through June 30, 2000, was provided), bank records, or records recording the disposition of allegedly dissipated assets. On June 5, 2001, the Bankruptcy Court issued the preclusionary sanction, an establishment of fact, because Focus Media failed to comply fully with the court's order. The court established that Focus Media was not paying its debts as they came due shortly before and at the time of the involuntary petition and that Focus Media was not paying debts owed to the petitioning creditors as those debts became due shortly before and at the time the involuntary petition was filed.

4. Analysis

The Bankruptcy Court's preclusionary sanctions establishing certain facts is affirmed. The issuance of the preclusion order came after *extensive* hearings and repeated argument by counsel for both parties regarding the discovery of essential documents and business records. The efforts to obtain production lasted approximately six months, and Focus Media was given numerous opportunities to exert meaningful effort to comply with the discovery requests and the court's orders thereon. The record supports the Court's finding that Focus Media failed to fully comply.

Given the requirement that an involuntary petition to compel bankruptcy required determination as soon as possible, Focus Media's failure to respond timely and meaningfully to discovery and interrogatories impeded a prompt resolution and was disobedient to the Bankruptcy Court's orders. While Focus Media was under the control of a trustee, Focus Media and its counsel nevertheless had access to documents. Furthermore, Focus Media was responsible for its financial records at issue. As it was, the records ultimately produced from those in the trustees' possession were not up to date; the financial documents ceased recording Focus Media's finances months before the petition was filed. Focus Media did not respond to discovery requests in a meaningful or organized manner. The fact that it had essentially ceased to operate does not excuse its failure to provide the financial records a company is required to maintain and which were necessary to adjudicate the involuntary bankruptcy. Focus Media never supplied complete, up-to-date financial records essential for the determination of whether or not it had been regularly paying its debts as they came due. As a result, the Bankruptcy Court was justified in establishing certain facts relating to Focus' payment of its debts.

The Bankruptcy Court did not abuse its discretion in imposing the stated sanctions against Focus for failing to adequately respond to discovery.

D. Petitioning Creditors' Motion for Summary Judgment re Involuntary Petition

1. Introduction

On August 1, 2001, the petitioning creditors filed a Motion for Summary Judgment on Involuntary Bankruptcy.

(R. Vol. 13, Ex. 12.) In support thereof petitioning creditors included the Declaration of Bruce Wessel with sixteen (16) exhibits (R. Vol. 13, Ex. 114) and a statement of uncontroverted facts and conclusions of law (R. Vol. 13, Ex. 113). Focus filed opposition on August 14, 2001. (R. Vol. 14, Ex. 115.) In support thereof Focus included the declarations of Tom Rubin, Bertram Fields, Peter Craig, Sherry Donnelly, and Tom Sullivan (R. Vol. 14, Ex. 116); the declaration of Geoffrey Mousseau with twenty-three (23) exhibits (R. Vol. 14, Ex. 117); the declaration of Eric Selten with eleven (11) exhibits (R. Vol. 15, Ex. 118); and a statement of genuine issues (R. Vol. 15, Ex. 119.) Petitioning creditors filed a corrected reply on August 24, 2001 (R. Vol. 15, Ex. 120), which included the declaration of Sean Lokey (R. Vol. 15, Ex. 121), evidentiary objections (R. Vol. 15, Ex. 122), and objections to Focus Media's statement of genuine issues (R. Vol. 15, Ex. 126). Petitioning creditors filed a supplemental declaration of Bruce Wessel and two exhibits on August 21, 2001. (R.Vol. 15 Ex. 123.) Focus Media filed evidentiary objections on August 24, 2001. (R. Vol. 15, Ex. 124.) Focus Media filed a supplemental filing on August 28, 2001. (R. Vol. 16, Ex. 127.) The matter was heard on August 28, 2001.

On September 24, 2001, the Bankruptcy Court granted in part and denied in part the petitioning creditors' motion. (R. Vol. 15, Ex. 129.) The court granted the motion insofar as it ruled that seven of the eight petitioning creditors had shown that they were owed debts that were not being paid and that were not subject to *bona fide* dispute. It declined to adjudicate summarily, and reserved for trial, the alleged debt of ABC and Focus Media's claim of a bad faith filing of the bankruptcy petition by ABC. The bankruptcy judge thereafter filed an exhaustive statement of "Findings of Fact and Conclusions of Law." (Bankruptcy Court's "Findings of Fact

and Conclusions of Law on Petitioning Creditors' Motion for Summary Judgment/Summary Adjudication on Involuntary Petition in Bankruptcy," (hereinafter, Bankruptcy Findings), AA Vol. 6, Ex. 53.)

Focus Media contends that there was a genuine issue regarding whether the amounts that Focus Media owed its creditors were subject to *bona fide* dispute. Focus Media relies on a case issued by the Court of Appeals for the Ninth Circuit on August 28, 2001, and amended on January 17, 2002, which clarifies the standard applicable within this Circuit for assessing whether a *bona fide* dispute exists. *Liberty Tool & Manufacturing v. Vortex Fishing Systems, Inc.* (*In re Vortex Fishing Systems, Inc.*), 262 F.3d 985 (9th Cir. 2001); *amended* 277 F.3d 1057 (9th Cir. 2002).

Focus media argues that its numerous declarations in opposition to the motion for summary judgment describe a "post-analysis" procedure that undermines any presumption that debts were owed in any amount, creating a genuine issue which undermined summary judgment. It also argues that the Bankruptcy Court erred by allowing particular exhibits, to wit, the aged payable reports.

Appellees argue that there was sufficient evidence to show that there were claims not subject to a *bona fide* dispute which were not being paid when due.

2. Legal Standard

A motion for summary judgment is reviewed under the *de novo* standard of review. *Balint v. Carson City*, 1809 F.3d 1047, 1050 (9th Cir. 1999).

Federal Rule of Bankruptcy Procedure 7056 incorporates Fed. R. Civ. Proc. 56. Under Rule 56, a moving party is entitled to judgment as a matter of law when there is no issue as to any material fact considering the pleadings and the evidence presented. *Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986). A non-moving party must come forward with competent evidence to show the existence of a genuine issue of material fact as to each element of its claim to avoid summary judgment. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986).

Title 11 United States Code, Section 303 allows petitioners to impose bankruptcy on an alleged debtor against that debtor's will (an involuntary petition). If the alleged debtor has more than twelve creditors, the petitioners must show that there are: 1) three qualified petitioning creditors (11 U.S.C. § 303(b)(1)); 2) with claims aggregating at least $10,775 (11 U.S.C. § 303(b)(1)); 3) such claims are not subject to *bona fide* dispute (11 U.S.C. § 303(b)(1)); and 4) the court shall order relief against the debtor on an involuntary petition only if that debtor is not paying debts as they become due (unless such debts are the subject of a *bona fide* dispute). 11 U.S.C. § 303(h)(1).

In re Vortex, adopts an objective test for determining whether a *bona fide* dispute exists. 277 F.3d at 1064-65. While the Bankruptcy Court did not apply *In re Vortex*, the Court here applies it in its *de novo* review of the summary judgment. *In re Vortex* requires a court to "determine whether there is an objective basis for either a factual or legal dispute as to the validity of the debt." *Id.*, *citing In re Busick*, 831 F.2d 745, 750 (7th Cir. 1987). In determining whether there is a *bona fide* dispute, the Bankruptcy Court "is not asked to evaluate the potential outcome of the dispute, but

merely to determine whether there are facts that give rise to a legitimate disagreement over whether money is owed, or, in some circumstances, how much." *In re Vortex*, 277 F.3d at 1064. This standard holds that if "there is a genuine issue of material fact that bears upon the debtor's liability, or a meritorious contention as to the application of law to undisputed facts, then the petition must be dismissed." *In re Vortex*, 262 F.3d at 1064 (internal citations omitted).

While Focus Media cites the legislative history of the case to suggest that any amount of dispute is a *bona fide* dispute, a *bona fide* dispute would appear to be a dispute which undermines the elements required for an involuntary petitioners [*sic*]. *In re Vortex* states that a legitimate dispute as to amount can be a *bona fide* dispute only in certain circum-stances. *In re Vortex*, 277 F.3d at 1064. Notwith-standing the portion of the legislative history cited, the plain meaning of 11 U.S.C. § 303(b) requires demonstration of certain statutory elements. A dispute as to any element which would undermine such element would create a *bona fide* dispute as to the petition. Applied to a disputed amount, the amount disputed must be such that the dispute undermines an element, the entire claim by a creditor, or enough of the claim for it to fall below the statutorily required value.

3. Pertinent Facts

In support of their Motion for Summary Judgment, petitioning creditors relied on three primary sets of evidence: (1) the preclusion sanction, (2) Focus Media's aged payables ledger, and (3) statements of Focus Media's principals in other proceedings. The petitioning creditors relied on the preclusionary sanction to establish element four for an involuntary petition, namely, that the debtor was not paying debts as they came due. The ledger shows debts owed, and

the parties' statements show that, as a general proposition, the debts were not disputed.

Focus Media relied on declarations that indicate that previous statements by its principals did not relate to specific debts owed (particularly as to the petitioning creditors) and that the amounts owed do not reflect the "post-analysis" which would reconcile debts and may have resulted in rebates to Focus, thus reducing the creditor's claims. Focus Media also objected to the introduction of the ledger (R. Vol. 13, Ex. 114, tabs A-B) as improperly received and considered by the Bankruptcy Court.

4. Analysis

Based on an independent review of the facts and arguments presented, the Court affirms the Bankruptcy Court's partial grant of the petitioning creditors' motion for summary judgment.

The main issue presented is whether the petitioning creditors' claims were subject to *bona fide* dispute. All other *prima facie* elements of an involuntary petition were met. First, the Bankruptcy Court had pre-determined the fourth element of an involuntary petition, applying its preclusionary order (reviewed herein) to establish that Focus Media was not paying its debts as they came due. (R. Vol. 9, Ex. 70.) Moreover, the Bankruptcy Court concluded, after reviewing the evidence presented in the motion, that there was no genuine issue that the debts were not being paid as they came due. (Bankruptcy Findings, AA Vol. 6, Ex. 53 at 2286.) Next, there was no genuine dispute that there were sufficient petitioning creditors. With the exception of ABC, Focus Media did not challenge the fact that there were at least three qualified petitioning creditors. In fact, there were seven.

(Bankruptcy Findings, AA. Vol. 6, Ex. 53 at 2283-87.) Third, the evidence established the second element, namely, aggregate claims of at least $10,775. (Bankruptcy Findings, AA Vol. 6, Ex. 53 at 2283-87.)

Other than its claim of bad faith petitioning asserted against ABC,[2] Focus Media's only argument against the motion for summary judgment of the involuntary petition was that all claims were subject to *bona fide* dispute. Focus Media argues that the *bona fide* dispute undermined both the amount and the existence of the claims.

Focus Media accurately states that disputes as to amount owed might undermine the involuntary petition under *In re Vortex*. However, *any* dispute as to amount does not constitute a *bona fide* dispute undermining the application of an involuntary petition. Focus Media did not demonstrate that the disputes based on "post-analysis"[3] undermined the validity of any claims or the aggregate amount owed so as to defeat the summary judgment of the involuntary petition. While *In re Vortex* indicates that a court should not speculate as to the outcome of the dispute, a court must assess at the summary judgment phase whether there exists a genuine issue as to whether money is owed.

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[2] As noted, the claim of bad faith against ABC was not decided in the summary adjudication proceedings. Because bad faith filing by one creditor may undermine the imposition of an involuntary bankruptcy adjudication, the Bankruptcy Court issued no order of relief until after the trial of Focus Media's claim of bad faith against ABC. 2 Collier on Bankruptcy, § 303.07 (15th Ed. 2001); *See also* R. Vol. 14, Ex. 130, R. Vols. 19-20, 10/18/01 & 10/18/02 Trial Tr.

[3] This term is a short-hand for an accounting mechanism by which media and advertisers reconcile amounts due after analysis of advertisement placement and viewer statistics.

The Bankruptcy Court properly concluded that there was no genuine issue of a *bona fide* dispute that would undermine the involuntary petition. The Court relied on Focus Media's Aged Payable Reports (R. Vol. 13, Ex. 114, tab A), Media Payables Over 30 Days (R. Vol. 13, Ex. 114, tab B), and declarations by Focus Media's principals Rubin (R. Vol. 13, Ex. 114, tab C; R. Vol. 13, Ex. 114, tab G at 4779, R. Vol. 13, Ex. 114, tab M) and Field in state court litigation to establish that Focus Media owed creditors a substantial amount of money that was nine months old at the time the involuntary petition was filed. (*See* Bankruptcy Findings, AA Vol. 6, Ex. 53 at 2283-85.)

The Bankruptcy Court properly admitted into evidence the Aged Payable and Media Payable reports as admissions under Fed. R. Evid. 801. (Bankruptcy Findings, AA Vol. 6, Ex. 53 at 2285-86.) The reports establish admitted amounts owed that were not disputed by Focus Media's declarations except insofar as such amounts would be subject to "post-analysis." Focus Media argues that the "post-analysis" would create a *bona fide* dispute. However, the Bankruptcy Court properly concluded that Focus Media's argument, its declarations, and the extensive reliance on the declaration of expert Eric Selten do not undermine the fact of amounts owed and failure to pay. First, it is not disputed that amounts due the media should be paid and then be subjected to post-analysis later. Second, Focus Media's argument does not undermine the amounts listed as owed in the payable reports, but only asserts that those amounts may be adjusted. There is no evidence that the listed amounts themselves were incorrect or definitely subject to post-analysis adjustment. Rather, Focus makes only an argument for the *potential* that the amounts would be in dispute. At the stage of summary adjudication, it was incumbent upon Focus Media to present evidence to support its contention of disputes as to the actual amounts, listed in the

reports or otherwise at issue, not merely to speculate how such claim could, potentially, be disputed. Finally, the Bankruptcy Court pointed out that expert Selten's declarations (R. Vol. 15, Ex. 118) do not undermine the amounts in the reports or statement of Focus Media's principals to the extent that the Focus Media's liability would fall below the $10,775 threshold. Selten's statements amounted to argument, not a demonstration of a *bona fide* dispute. (AA Vol. 6, Ex. 53 at 2287-89.) The Bankruptcy Court properly concluded that Focus Media had not created a genuine issue as to the existence of a *bona fide* dispute whether Focus Media owed at least three petitioning creditors at least $10,775 and that it was not paying its debts.

The Bankruptcy Court's decision regarding Petitioning Creditors' Motion for Summary Judgment/Summary Adjudication on Involuntary Petition in Bankruptcy is affirmed.

E. Disqualification

1. Introduction

Focus Media argues that the bankruptcy judge displayed bias in her rulings throughout the course of the litigation, warranting disqualification for bias, prejudice, or the appearance thereof. Focus Media twice moved to disqualify the bankruptcy judge: (1) On November 13, 2000 (R. Vol. 11, Ex. 94) on the basis that the bankruptcy judge had prejudged the case as demonstrated in granting the motion for an interim trustee and had done so by violating Focus' due process rights in that the hearing occurred on less than 24 hours' notice; and (2) on July 18, 2001 (R. Vol. 11, Ex. 98) on the basis of palpable bias, particularly the judge's order for principal Rubin to appear for deposition and her stated

suspicion that he had fled to France with monies improperly transferred to him by Focus Media. Both motions were denied. (Order Denying Motion to Disqualify Bankruptcy Judge, R. Vol. 11, Ex. 96; Order re: Focus Media's Motion to Disqualify Judge Kathleen P. March and Findings of Fact and Conclusions of Law re: Focus Media's Motion to Disqualify Judge Kathleen P. March, R. Vol. 11, Ex. 101 & 102; R. Vol. 18, Tr. 8/21/01, at 7267:24.)

Focus Media argues that the bankruptcy judge predetermined the case, deciding that there would be an order for relief for the petitioning creditors and against Focus Media. Focus Media further asserts that the bankruptcy judge subsequently "managed" the case to reach this foregone conclusion, improperly ruling against Focus Media, improperly exploring potential wrong acts beyond the scope of the proceedings, scolding/bullying Focus Media's counsel, and disparaging Focus Media's principals. Furthermore, Focus Media argues that the judge's references to the misconduct complaint it filed with the Court of Appeals indicate a bias. Focus Media's contention regarding the judge's bias relies entirely on the bankruptcy judge's rulings, orders, and courtroom actions. There is no claim of extra-judicial source of bias.

The appellees contend that the bankruptcy judge effectively managed the case, which was admittedly a difficult case and did include granting some preliminary relief.

2. Legal Standard

Federal Rule of Bankruptcy Procedure 5004(a) provides that disqualification of a bankruptcy judge is governed by 28 U.S.C. § 455. Title 28 U.S.C. Section 455(a) states in the pertinent part:

> Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

Liteky v. United States sets the standard that governs disqualification under §455. 510 U.S. 540, 555, 114 S. Ct. 1147, 127 L. Ed. 2d 474 (1994).

> First, judicial rulings alone almost never constitute a valid basis for a bias or partiality motion. In and of themselves (i.e., apart from surrounding comments or accompanying opinion), they cannot possibly show reliance upon an extra-judicial source; and they can only in the rarest of circumstances evidence the degree of favoritism or antagonism (as discussed below) when no extrajudicial source is involved. Almost invariably, they are proper grounds for appeal, not for recusal. Second, opinions formed by the judge on the basis of facts introduced or events occurring in the course of the current proceedings, or of prior proceedings, do not constitute a basis for bias or partiality motion unless they display a deep-seated antagonism that would make fair judgment impossible.

Liteky, 510 U.S. at 555. Furthermore, "[a] judge's ordinary efforts at courtroom administration – even a stern and short-tempered judge's ordinary efforts at courtroom administration remain immune." *Liteky*, 510 U.S. at 556.

3. Pertinent Facts

Focus Media alleges fifteen types of activity demonstrating bias or the appearance of bias, including the following:

(a) the Bankruptcy Judge's statement at the initial hearing that there "will be an order for relief" (R. Vol. 11, Ex. 94);

(b) petitioning creditors' counsel's repeated references to potential malfeasance by Thomas Sullivan and Tom Rubin which exacerbated the judge's bias; (R. Vol. 16, Tr. 1/30/01 at 6339, 6326);

(c) repeated verbal threats of sanctions against Focus Media and its counsel which includes:

i. threat of sanctions as consequence of initial disclosure delay (R.Vol. 16, Tr. 1/24/01 at 6340),

ii. threat of sanctions for taking frivolous positions/making frivolous arguments (R. Vol. 16, Tr. 1/24/01 at 6343,

iii. threat of sanctions for attorney if attorney willfully assisting client in unlawful act of non-compliance with court order (R. Vol. 16, Tr. 2/14/01 at 6427-28),

iv. suggesting attorneys "sub-out" if attorney were assisting client in unlawful non-compliance in discovery (R. Vol. 18, Tr. 8/21/01 at 7250),

(d) court order of sanctions during discovery against

Focus Media for $17,000 (sic)[4] (R. Vol. 6, Ex. 46, tab 5);

(e) precluding Rubin from testifying at trial (Order Precluding Rubin from Testifying, dated July 24, 2001, R. Vol. 10, Ex. 87,);

(f) "bullying" and "scolding" of counsel for Focus Media and suggestions that they substitute out;

(g) alleged acceptance of off-handed and unsubstantiated representations made by petitioning creditors' counsel while "grilling" Focus Media's counsel (*Compare* R. Vol. 18, Tr. 7/24/01 at 6992, *with* R. Vol. 17, Tr. 5/8/01 at 6639-6644);

(h) disparagement of Focus Media's principal, Tom Rubin, including reference to possible criminal conduct (Hearing on Interim Trustee, R. Vol. 16, Tr. 10/27/00 at 6111); Hearing on Motion to Disqualify, R. Vol. 18, Tr. 8/21/01 at 7249; Hearing on Pretrial Order, Motion to Recover Documents, Motion to Designate Facts, R. Vol. 17, Tr. 6/5/01 at 6726);

(i) "obsession" with the notion that Rubin would attempt to "drag out" the involuntary proceeding (*passim*);

(j) attempts to craft a record that would stand up on appeal rather than actually administering justice (Continued Hearing on Motion to Designate Facts, R. Vol. 17, Tr. 5/8/01 at 6630, 6632, 6646);

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[4] Despite Focus Media's assertion of the stated fines, the sanction in the cited record is $9,558 representing costs accrued by petitioning creditors in attorneys' fees for preparing the motion to compel. Focus does not identify other sanctions.

(k) repeated references to the judicial misconduct complaint (R. Vol. 17. Tr. 7/10/01 at 6977; R. Vol. 18, Tr. 8/21/01 at 7245, 7263-7267; R. Vol. 17, Tr. 6/11/01 at 6755);

(l) evidentiary ruling allowing cross-examination of witness Sullivan about misconduct complaint over Focus Media's objection (R. Vol. 20, Tr. 10/19/01, 8237-44);[5]

(m) reference to the judicial misconduct complaint in trial Findings of Fact and Conclusions of law to discrediting Sullivan (R. Vol. 15, Ex. 130 at 5861, ¶¶ 52-53);

(n) improper treatment of Focus Media as debtor, not as respondent;

(o) improper administration of the case, including, for example, forcing the trial to proceed to extremely late hours, including up to 1:00 a.m. on what would be October 20, 2001, in an effort to ensure that it concluded by October 19, 2001.

4. Analysis

Having read the lengthy record of hearings and considered the incidents alleged to demonstrate bias or the appearance of bias, the Court affirms the Bankruptcy Court's denial of the motions to disqualify. Neither the Bankruptcy Court's Rulings nor the existence of Focus Media's judicial misconduct complaint (which it served on the bankruptcy judge) and references thereto demonstrate a deep-seated antagonism making fair judgment impossible.

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[5] The citation provided by appellant does not demonstrate the objection or line of questioning of which appellant complains.

While *Liteky* rejects the requirement that bias warranting recusal must stem from an extra-judicial source, it emphasizes that bias based on facts learned during the litigation and based on rulings and conduct pursuant to the contrary exercise of judicial duties is rarely grounds for disqualification. Rather, judicial rulings and the grounds thereof are properly issues for appeal. Focus Media's foundations for disqualification rely on judicial rulings and comments thereon in the course of proceedings. The allegations risk the very concern noted in *Liteky*, that judicial rulings and events in the course of proceedings not confound disqualification with valid bases for appeal.

The Bankruptcy Court's references to potential malfeasance, its threats of sanctions, and extremely long hours spent in trial do not indicate bias, but do demonstrate the lengthy, often rancorous proceedings that characterize the record. The numerous and extensive hearings, protracted proceedings, and lengthy trial indicate that the court carefully heard and considered every issue and had not predetermined the outcome of the petition. The comments and rulings were made in the context of the almost year-long proceedings and based on the information furnished to the judge during the course of litigation. The Bankruptcy Court's treatment of Focus Media, its attorneys, and its principals appears to be part of the court's efforts to address efficiently the underlying bankruptcy petition in a timely manner, a process in which all parties were required to cooperate.

The references to the complaint for judicial misconduct against the Bankruptcy Judge filed on behalf of Focus Media with the Ninth Circuit Judicial Council deserve separate comment. Focus Media filed a complaint of judicial misconduct, signed by its CFO Sullivan, against Judge March before the Court of Appeals. Focus Media served the

complaint by causing delivery to the judge's chambers. The Bankruptcy Court's initial mention of the complaint was to notify counsel for petitioning creditors on the record that the Court had received an ex parte communication from Focus Media which included a copy of the judicial complaint. (R. Vol. 17, Tr. 6/11/01 at 6755.) The Bankruptcy Court's second reference to the misconduct complaint was in response to counsel for Focus Media's repeated assertion that the Court had made mistakes and suggestions that bad faith had been involved. (R. Vol. 17, Tr. 7/10/01 at 6977.) The Bankruptcy Court's third reference to the misconduct complaint arose in the context of the second disqualification motion. (R. Vol. 18, Tr. 8/21/01 at 7245, 7263-7267.)

Before the hearing on the second motion to disqualify, on August 21, 2001, the bankruptcy judge made available to the parties a lengthy tentative ruling that explained her research and petition to a judicial committee created for advising on such matters, concluding in the advance written ruling that Focus Media's motion should be denied. At the hearing, the Bankruptcy Court pointed out that the misconduct complaint should have been preceded by a motion to disqualify. Judge March gave Focus Media's counsel as much time as he chose to argue the matter and then recounted the standard for disqualification and stated that the filing of motions for disqualification based only on rulings and statements during a hearing were not substantive grounds for recusal. The court did insinuate, as argued by petitioning creditors' counsel, that the motion was an effort to influence the court, considering the timing of the filing of the motion for recusal immediately prior to hearing on other important motions.

The Bankruptcy Court also compelled Tom Sullivan to respond to questions regarding the misconduct complaint, but this order does not, as suggested in petitioner's brief, show

bias. The order compelled responses to the petitioning creditor's interrogatories. (R. Vol. 17, Tr. 7/10/01 at 6962-63.) The order cited the proper legal standard delineating the scope of discovery, that anything relevant to any claim or defense was discoverable. Fed. R. Bankr. P. 7026(b); Fed. R. Civ. P. 26(b); (R. Vol. 17, Tr. 7/10/01 at 6962, lines 14-15). Inasmuch as the misconduct complaint included the signed statement of a Focus Media principal (Sullivan) and recounted facts regarding Focus Media and the bankruptcy litigation, the complaint and questions about its contents were relevant. The order compelling responses was not initiated by the court, nor does it evidence a bias by the court or some improper use or consideration of the complaint.

The introduction of the judicial complaint in trial and reference to it in the Bankruptcy Court's findings of fact and conclusions of law is unusual. However, the Bankruptcy Court's allowance of cross-examination and impeachment of Tom Sullivan using the judicial misconduct complaint and its reference to the complaint in the court's findings of fact and conclusions of law do not demonstrate bias. (Tr. 10/19/02, at 8164-72; R. Vol. 15, Ex. 130, p. 5861.) The complaint for judicial misconduct was offered to impeach Tom Sullivan as a witness. (Id. at 8164-65.)

Petitioner has not appealed the admissibility of the complaint, implicating the concerns noted in *Liteky* about confusing appealable issues and judicial bias. Furthermore, the admission and consideration of the complaint does not demonstrate an abiding bias. The Bankruptcy Court did not initiate reference to the misconduct complaint; the petitioning creditors did. Merely allowing the admission of the complaint for impeachment, which contained statements about earlier proceedings in the case, did not demonstrate bias. Ultimately, the cross-examination based on the complaint ceased based on

the witness' assertion of his Fifth Amendment right not to incriminate himself. The inclusion of the reference to the judicial misconduct complaint in the Bankruptcy Court's findings of fact and conclusions of law was simply a recitation of declarations and statements introduced into evidence – which included the signed complaint – upon which the court relied in assessing witness Tom Sullivan's credibility. (R. Vol. 15, Findings of Facts and Conclusions of Law re: Trial on Remaining Issues on Involuntary Petition, at 5861, ¶ 52.) The reference to the judicial misconduct complaint does not show bias, preoccupation with the complaint, or improper consideration of the complaint by the court.

The bankruptcy judge did not abuse her discretion in denying the motions to disqualify. None of the grounds asserted required disqualification. The cited behavior consists of judicial rulings, trial administration, and ordinary – and sometimes stern and harsh – admonitions issued in the course of judicial proceedings. The reference to a complaint regarding judicial misconduct was thrust into the proceedings by Focus Media; it cannot be heard to complain of reference to it without a showing that the bankruptcy judge became biased as a result thereof. The grounds asserted do not display an antagonism or appearance of antagonism that would make the proceedings unfair or make a just adjudication impossible.

IV.

CONCLUSION

The record shows a contentious and lengthy record of motions, hearings, and trial. After reviewing the record furnished by the parties to the appeal, the Court does not find that reversal of the bankruptcy court's orders should result.

Accordingly, the Court affirms the Bankruptcy Court's imposition of a preclusionary sanction for failure to comply with discovery, issuance of summary adjudications, and denials of the motions to disqualify the assigned judge.

IT IS SO ORDERED.

IT IS FURTHER ORDERED that the Clerk shall serve a copy of this Order on counsel for all parties in this action.

DATED: April 28, 2003.

/s/ ALICEMARIE H. STOTLER
ALICEMARIE H. STOTLER
United States District Judge

E-32

NOTICE PARTY SERVICE LIST

Case No. SA CV 01-1146 AHS
BK. LA 00-38197 KM

Case Title In Re Focus Media

Title of Document Order Affirming Bankruptcy Court's Orders

(Only relevant marked part of court form included.)

X	BAP (Bankruptcy Appellate Panel)
X	US Bankruptcy Court
X	US Trustee's Office

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APPENDIX F

NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED
NOV 15 2004
Cathy A. Catterson, Clerk
U.S. Court of Appeals

In Re: FOCUS MEDIA, INC.,
Debtor,

FOCUS MEDIA, INC.,
Appellant,
v.
NATIONAL BROADCASTING COMPANY INC.; ABC INC.; PAXSON COMMUNICATION INC.,
Appellees.

No. 03-55808
D.C. No.
CV-01-01146-AHS

ORDER

BEFORE: T. NELSON, TASHIMA and FISHER, Circuit Judges.

Judge Fisher voted to deny appellant's petition for rehearing en banc, and Judges Nelson and Tashima recommended denying the petition for rehearing en banc.

The full court has been advised of the petition for rehearing en banc and no judge of the court has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing en banc, filed August 16, 2004, is **DENIED**.

APPENDIX G

11 U.S.C. §303. Involuntary cases

(a) An involuntary case may be commenced only under chapter 7 or 11 of this title, and only against a person, except a farmer, family farmer, or a corporation that is not a moneyed, business, or commercial corporation, that may be a debtor under the chapter under which such case is commenced.

(b) An involuntary case against a person is commenced by the filing with the bankruptcy court of a petition under chapter 7 or 11 of this title –

(1) by three or more entities, each of which is either a holder of a claim against such person that is not contingent as to liability or the subject of a bona fide dispute, or an indenture trustee representing such a holder, if such claims aggregate at least $10,000 more than the value of any lien on property of the debtor securing such claims held by the holders of such claims;

(2) if there are fewer than 12 such holders, excluding any employee or insider of such person and any transferee of a transfer that is voidable under section 544, 545, 547, 548, 549, or 724(a) of this title, by one or more of such holders that hold in the aggregate at least $10,000 of such claims;

(3) if such person is a partnership -

(A) by fewer than all of the general partners in such partnership; or

(B) if relief has been ordered under this title with respect to all of the general partners in such partnership, by a general partner in such partnership, the trustee of such a

general partner, or a holder of a claim against such partnership; or

(4) by a foreign representative of the estate in a foreign proceeding concerning such person.

(c) After the filing of a petition under this section but before the case is dismissed or relief is ordered, a creditor holding an unsecured claim that is not contingent, other than a creditor filing under subsection (b) of this section, may join in the petition with the same effect as if such joining creditor were a petitioning creditor under subsection (b) of this section.

(d) The debtor, or a general partner in a partnership debtor that did not join in the petition, may file an answer to a petition under this section.

(e) After notice and a hearing, and for cause, the court may require the petitioners under this section to file a bond to indemnify the debtor for such amounts as the court may later allow under subsection (i) of this section.

(f) Notwithstanding section 363 of this title, except to the extent that the court orders otherwise, and until an order for relief in the case, any business of the debtor may continue to operate, and the debtor may continue to use, acquire, or dispose of property as if an involuntary case concerning the debtor had not been commenced.

(g) At any time after the commencement of an involuntary case under chapter 7 of this title but before an order for relief in the case, the court, on request of a party in interest, after notice to the debtor and a hearing, and if necessary to preserve the property of the estate or to prevent loss to the estate, may order the United States trustee to appoint an interim trustee

under section 701 of this title to take possession of the property of the estate and to operate any business of the debtor. Before an order for relief, the debtor may regain possession of property in the possession of a trustee ordered appointed under this subsection if the debtor files such bond as the court requires, conditioned on the debtor's accounting for and delivering to the trustee, if there is an order for relief in the case, such property, or the value, as of the date the debtor regains possession, of such property.

(h) If the petition is not timely controverted, the court shall order relief against the debtor in an involuntary case under the chapter under which the petition was filed. Otherwise, after trial, the court shall order relief against the debtor in an involuntary case under the chapter under which the petition was filed, only if –

(1) the debtor is generally not paying such debtor's debts as such debts become due unless such debts are the subject of a bona fide dispute; or

(2) within 120 days before the date of the filing of the petition, a custodian, other than a trustee, receiver, or agent appointed or authorized to take charge of less than substantially all of the property of the debtor for the purpose of enforcing a lien against such property, was appointed or took possession.

(i) If the court dismisses a petition under this section other than on consent of all petitioners and the debtor, and if the debtor does not waive the right to judgment under this subsection, the court may grant judgment –

(1) against the petitioners and in favor of the debtor for –

(A) costs; or

(B) a reasonable attorney's fee; or

(2) against any petitioner that filed the petition in bad faith, for –

(A) any damages proximately caused by such filing; or

(B) punitive damages.

(j) Only after notice to all creditors and a hearing may the court dismiss a petition filed under this section –

(1) on the motion of a petitioner;

(2) on consent of all petitioners and the debtor; or

(3) for want of prosecution.

(k) Notwithstanding subsection (a) of this section, an involuntary case may be commenced against a foreign bank that is not engaged in such business in the United States only under chapter 7 of this title and only if a foreign proceeding concerning such bank is pending.

Federal Rules of Bankruptcy Procedure
Rule 1003. Involuntary Petition

(a) **Transferor or Transferee of Claim.** A transferor or transferee of a claim shall annex to the original and each copy of the petition a copy of all documents evidencing the transfer, whether transferred unconditionally, for security, or otherwise, and a signed statement that the claim was not transferred for the purpose of commencing the case and setting forth the consideration for and terms of the transfer. An entity that has transferred or acquired a claim for the purpose of commencing a case for liquidation under chapter 7 or for reorganization under chapter 11 shall not be a qualified petitioner.

(b) **Joinder of Petitioners After Filing.** If the answer to an involuntary petition filed by fewer than three creditors averse the existence of 12 or more creditors, the debtor shall file with the answer a list of all creditors with their addresses, a brief statement of the nature of their claims, and the amounts thereof. If it appears that there are 12 or more creditors as provided in §303(b) of the Code, the court shall afford a reasonable opportunity for other creditors to join in the petition before a hearing is held thereon.

(3)

No. 04-1107

Supreme Court, U.S.
FILED
APR 2 9 2005
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In The
Supreme Court of the United States

FOCUS MEDIA, INC.,

Petitioner,

vs.

NATIONAL BROADCASTING COMPANY, INC.; ABC, INC.; PAXSON COMMUNICATIONS, INC.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR REHEARING

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INTRODUCTION

On April 4, 2005, the Court denied Focus Media Inc.'s Petition for Writ of Certiorari. Just over one week ago, on April 20, 2005, President Bush signed into law the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("Bankruptcy Reform Act" or "Act"), Pub. L. No. 109-8. A section of that legislation overruled the law upon which the Ninth Circuit relied below. Specifically, the Act establishes that involuntary bankruptcy petitions cannot be filed by creditors whose claims are disputed in amount, and also mandates that bankruptcy courts may not evaluate claims to split off amounts deemed undisputed to count toward the statutory claims threshold for such petitions. This section of the Act, which Congress made effective immediately and retroactive to all pending cases, compels a result different from that reached by the Ninth Circuit here. In such circumstances, this Court has frequently exercised its summary disposition power to grant a writ of certiorari, vacate the decision below, and remand for reconsideration in light of the new law. Although the Act became law after this Court denied the petition for certiorari, a timely petition for rehearing is a recognized, acceptable means of bringing new law to the Court's attention. This petition is timely, and this is a classic case for a GVR.

SUMMARY OF NATURE OF CASE AND PRIOR PROCEEDINGS

The procedural history is set forth in detail in the Petition for Certiorari. Petitioner Focus is an independent media buying company that purchased media time for resale to customers from local radio and television stations and vendors of cable television. Focus' debts to these companies for the airtime is usually uncertain and unliquidated, due to the pricing of broadcasting airtime. The value of airtime depends in large measure on the size and nature of the particular viewing audience. Focus was

billed initially on an estimated basis, but the amounts actually owed under the contracts were determined retroactively after a "post-analysis" adjustment applying Nielsen ratings to the specific channel and time of each airing. The post-analysis frequently revealed that vendors had over-estimated their billings.

A billing and payment dispute arose between NBC affiliates and Focus. In March 2000, NBC sued Focus in the United States District Court for the Central District of California, seeking a prejudgment writ of attachment under California law. The court denied that request, concluding that the amount of the claim was not "readily ascertainable," as required for issuance of the writ (App. 1).

Apparently unsatisfied, NBC enlisted the aid of ABC and Paxson (joint Respondents here), and on October 6, 2000, they filed an involuntary bankruptcy petition against Focus. Involuntary bankruptcy is, putting it mildly, a significant event in the life of a business, and typically results in its demise. Congress has, accordingly, set forth exacting standards for such petitioning creditors. The Bankruptcy Code requires that: (1) the requisite number of petitioning creditors (2) each holds a non-contingent claim against the debtor not "the subject of a bona fide dispute" and (3) that total in aggregate at least a statutory minimum amount [then $10,775]. 11 U.S.C. § 303(b)(1), (2).

Respondents recognized in the bankruptcy court that the total amounts Focus owed each of them was contested, given claimed offsets and recoupment, but argued that undisputed portions of the alleged debts exceeded the $10,775 threshold. At their request, the bankruptcy court evaluated the evidence of their claims and concluded that a sufficient core amount was due and exceeded the threshold. As a result, Focus was forced into Chapter 7 bankruptcy and its assets were sold, leaving it with a damages claim against Respondents for filing a wrongful petition. 11 U.S.C. § 303(i).

On appeal, the Ninth Circuit interpreted Bankruptcy Code § 303(b) to mean that a bankruptcy court, in determining whether a claim could be used to compel an involuntary bankruptcy, could split the claim into a disputed part and an undisputed part, and count the undisputed component toward the statutory minimum. The Ninth Circuit's essential holding, and the reason it rejected Focus' appeal and affirmed on this point, was summed up in one sentence: "We disagree with Focus' contention that an uncertainty or dispute as to amounts owed above $10,775 can create a bona fide dispute as to the entire debt." (Pet. Cert. App. A at A12-A13; 378 F.3d at 926).

Focus respectfully suggests that the Ninth Circuit erred in its interpretation of Section 303(b). It has never been Congress' intention to permit splitting of claims, using bankruptcy courts instead of state courts to determine what parts of debts are valid, and forcing a company's liquidation based on a bankruptcy judge's weighing of claims and counterclaims and recoupment defenses. Whatever doubt there may have been on that proposition prior to the enactment of the Bankruptcy Reform Act last week, there is no doubt now.

REASONS FOR GRANTING THE PETITION

A. Congress Amended Section 303 To Overrule Decisions, Such as the Ninth Circuit's Decision Below, That Have Misinterpreted the Statute to Authorize Splitting of Claims

Section 1234(a) of the Bankruptcy Reform Act amended 11 U.S.C. § 303. As amended, it now provides, in pertinent part:

> (b) An involuntary case against a person is commenced by the filing with the bankruptcy court of a petition under chapter 7 or 11 of this title –
>
> (1) by three or more entities, each of which is either a holder of a claim against such person

> that is not contingent as to liability or the subject of a bona fide dispute *as to liability or amount*, or an indenture trustee representing such a holder, if such *noncontingent undisputed* claims aggregate at least $12,300 more than the value of any lien on property of the debtor securing such claims held by the holders of such claims; . . .
>
> (h) . . . [A]fter trial, the court shall order relief against the debtor in an involuntary case . . . only if, (1) the debtor is generally not paying such debtor's debts as such debts become due unless such debts are the subject of a bona fide dispute *as to liability or amount*;. . . .

(*See* App. 2 (emphasis added to show new language).)

Congress also expressly made this amendment retroactive:

> (b) EFFECTIVE DATE; APPLICATION OF AMENDMENTS – This section [1234(a)] and the amendments made by this section shall take effect on the date of the enactment of this Act and shall apply with respect to cases commenced under title 11 of the United States Code before, on, and after such date.

(App. 2.)

Congress has thus now made clear that "each" creditor attempting to force an alleged debtor involuntarily into bankruptcy must hold "a claim" that is not "the subject of a bona fide dispute as to liability *or* amount" (emphasis added). Congress' use of the disjunctive term "or," of course, is significant, and it signals the courts to give independent meaning to each word on either side of the "or." *New York Gaslight Club, Inc. v. Carey*, 447 U.S. 54, 61 (1980); *Reiter v. Sonotone Corp.*, 442 U.S. 330, 337-39 (1979). In short, the plain language of the amendment makes clear that even where a claim is subject to a bona fide dispute *solely* as to amount, that claim may not be used by a creditor to force an alleged debtor into involuntary bankruptcy.

To reinforce the point, Congress in the next sentence of the statute made clear that only "undisputed claims" may be aggregated to reach the threshold amount. This language is flatly inconsistent with the analysis applied by the Ninth Circuit, which held that a claim that is disputed as to amount may be used to compel involuntary bankruptcy, so long as there is an undisputed portion of the claim meeting the threshold amount.

We respectfully suggest that the plain language of the statute is clear. The legislative history also confirms this reading, and, indeed, reveals that Congress' intention was exactly to overrule appellate decisions like the one below.

A Committee Report accompanying the Senate Bill that eventually became the Act explained the amendments to Section 303. "This provision amends section 303(b)(1) to specify that a creditor would be ineligible to file an involuntary petition if the creditor's claim was the subject of a bona fide dispute as to liability or amount." H.R. Rep. No. 109-31, pt. 1, at 149 (2005) (App. 3.) The Report goes on to clarify that the amendment "further provides that the claims needed to meet the monetary threshold must be undisputed." *Id.*

The Act's legislative history also includes a statement by Representative Edward Royce when the House voted on the bill. Representative Royce explained that bankruptcy court is, in Congress' view, the wrong forum for resolving disputed claims or attempting to sort out whether and what portion of a disputed claim should be regarded as undisputed.

> Section 1234 reemphasizes that a person who disputes *the amount of*, or liability for, a claim should not be disadvantaged by the stigma and expense of an involuntary bankruptcy proceeding. Put simply, the bankruptcy courts in this nation should now uniformly hold that any claim that is subject to a dispute or litigation, or if it is contested, *whether as to the amount of the claim,*

> *or as to liability for the claim*, that claim cannot be used to commence an involuntary bankruptcy case. This is the *bright line* that Congress intended to create in 1984 because involuntary bankruptcy carries with it, not only a responsibility, but the burden on behalf of petitioning creditors to be accurate and certain that their provable claims are qualified by being *without dispute as to either liability or amount* before commencing an involuntary bankruptcy case.

151 CONG. REC. E677-78 (daily ed. Apr. 18, 2005) (statement of Rep. Royce) (emphasis added) (App. 4-5.)

Representative Royce noted further that the amendments to Section 303 were made necessary by judicial decisions, like the Ninth Circuit's decision below, that permitted "splitting" of claims into disputed and non-disputed components:

> It is incomprehensible that an involuntary bankruptcy petition could be based on claims that are inaccurate as to either liability or amount; the injustice that would result from such a filing is so manifest. Despite this manifest injustice of national significance, judges continue to condone the filing of involuntary petitions brought by creditors using disputed claims. For this reason, section 1234 was made a necessary part of this legislation.
>
> * * *
>
> This clarification is necessary because the intent of Congress has been blurred by judicial decisions that go so far as to split disputed claims into "disputed" and "undisputed" parts, or to describe disputes as "potential disputes." These decisions are wrong and the damage they have caused to the victims of involuntary bankruptcy cases brought using such claims is incalculable.

Id. at E677-78 (App. 5-6.)

It is unclear from the legislative history whether Representative Royce was specifically referring to the Ninth Circuit's decision below, or the previous holding on which it relied, *Chicago Title Ins. Co. v. Seko Invs., Inc. (In re Seko Invs., Inc.)*, 156 F.3d 1005 (9th Cir. 1998). His comments, however, establish that Congress intended to overrule the rationale of these decisions and, effective immediately to pending cases, prohibit claim "splitting" analysis like that applied by the Ninth Circuit to affirm Focus' involuntary bankruptcy.

B. An Amendment To a Controlling Federal Statute Is a Quintessential Occasion for a GVR

This Court has entered orders to grant, vacate, and remand – a practice commonly referred to by the acronym "GVR" – in a wide variety of circumstances in which a new development might reasonably be expected to cause a lower court to reconsider its prior ruling. *Lawrence v. Chater*, 516 U.S. 163, 166-67 (1996) (collecting cases); *see generally* R. Stern, et al., SUPREME COURT PRACTICE § 5.12(b), at 317 (8th ed. 2000). One such common new development warranting a GVR is the passage of a new statute. *E.g.*, *Bureau of Economic Analysis, United States Dep't of Commerce v. Long*, 454 U.S. 934 (1981); *Sioux Tribe of Indians v. United States*, 329 U.S. 685 (1946); *cf. Chater*, 516 U.S. 163 (GVR for reconsideration in light of new agency interpretation of federal statute); *Omaha Nat'l Bank v. Nebraskans for Independent Banking*, 426 U.S. 310, 310-11 (1976) (GVR for reconsideration in light of new state statute that could have "substantial bearing" on the outcome of the case).

This Court discussed GVR practice at length in *Lawrence v. Chater*, 516 U.S. 163. The Court held that "[w]here intervening developments, or recent developments that we have reason to believe the court below did not fully consider, reveal a reasonable probability that the decision below rests upon a premise that the lower court would reject if given the opportunity for further

consideration, and where it appears that such a redetermination may determine the ultimate outcome of the litigation, a GVR order is, we believe, potentially appropriate." *Id.* at 167. Whether such an order ultimately ought to issue, the Court concluded, "depends further on the equities of the case." *Id.* at 167-68. Specifically, the Court found the equities might not favor a GVR order if the petitioner was using the request as "part of an unfair or manipulative litigation strategy," or if the benefits of a GVR appeared minimal. *Id.*[1]

The Court's analysis in *Chater* establishes that the ordinary factors for determining whether to grant a writ of certiorari do not apply to the decision whether to enter a GVR order. *See id.* at 174; *see also Thomas*, 519 U.S. at 914 (Scalia, J., concurring). The GVR procedure conserves the resources of the Court, "assists the court below by flagging a particular issue that it does not appear to have fully considered," assists this Court by "procuring the benefit of the lower court's insight," and alleviates the "potential for unequal treatment that is inherent in [this Court's] inability to grant plenary review of all pending cases. . . . " *Chater*, 516 U.S. at 167 (internal quotation omitted).

This is a classic case for a GVR. In the Bankruptcy Reform Act, Congress overruled judicial interpretations of Bankruptcy Code § 303 that permit bankruptcy courts to displace state court resolution of amounts due and force a business into liquidation whenever the bankruptcy judge concludes a sufficient amount is not legitimately disputed.

---

[1] Justice Scalia dissented from the Court's opinion in *Chater*, suggesting a greater degree of certainty of error below should be necessary for a GVR. 516 U.S. at 177 (Scalia, J., dissenting). In a subsequent opinion, however, Justice Scalia indicated that he would find the GVR practice appropriate where, as here, a new development of controlling law "appears to contradict" the lower court's decision. *Thomas v. American Home Prods., Inc.*, 519 U.S. 913, 915 (1996) (Scalia, J., concurring).

Under the Act, there is not merely a "reasonable probability" that the Ninth Circuit would reconsider its analysis, but a compulsion to do so.[2]

The equities also favor a GVR order. Focus is not seeking a GVR for purposes of delay or otherwise to manipulate the judicial process. The Act on which it relies became law just nine days ago. As noted, Congress expressly made section 1234 retroactive to benefit parties in Focus' position.

C. A Timely Petition for Rehearing Is a Proper Procedural Mechanism To Bring a Change In Law To the Court's Attention

Focus filed its petition for writ of certiorari before the change in the law. The Court denied the petition for writ of certiorari on April 4, 2005. This petition is timely under Rule 44.2. The enactment, after a petition for writ of certiorari has been denied, of "new legislation that has a substantial or controlling effect upon the case" is a sufficient "intervening circumstance" to justify a timely petition for rehearing. *See* Stern, *supra*, § 15.6(b), at 731 (citing *Massey v. United States*, 291 U.S. 608 (1934) and *Sioux Tribe*, 329 U.S. at 685).

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[2] Although the Ninth Circuit indicated that it accepted, as a matter of fact, that there was no bona fide dispute on the claims (Pet. Cert. App. A. at 12), that discussion was plainly premised on its later determination that a counterclaim or claim for recoupment could not create a genuine dispute as a matter of law if it did not reduce the alleged liability below the statutory threshold amount. (*Id.* at 12-14.) The Ninth Circuit is all but certain to reconsider that analysis in light of the amendment to section 303.

CONCLUSION

This Court should grant the petition, vacate the decision below, and remand for reconsideration in light of section 1234 of the Bankruptcy Reform Act.

Respectfully submitted, this 29th day of April, 2005.

LEWIS AND ROCA LLP

SUSAN M. FREEMAN
(Counsel of Record)
LAWRENCE A. KASTEN

Counsel for Petitioner
Focus Media, Inc.

CERTIFICATE OF COUNSEL

Undersigned counsel certifies that this Petition for Review is restricted to the grounds specified in this Court's Rule 44.2 and that it is presented in good faith and not for delay.

SUSAN M. FREEMAN
(Counsel of Record)

Minute Entry of United States District Court for the Central District of California (Apr. 26, 2000).

PROCEEDINGS: (IN CHAMBERS)

Plaintiff's Application for Writ of Attachment is DENIED. Two Superior Court judges have separately asserted jurisdiction over Sears' and Universal's funds owed to media outlets, and have issued substantial and precise orders over the funds. Although the ultimate determination of the potentially dispositive legal issue of *Colorado River* abstention is properly left for Judge Marshall, at this juncture the magistrate judge will refrain from issuing an order conflicting with those already issued by the Superior Court.

Although this court rules based on the reasoning of the foregoing paragraph, the court has spent considerable time analyzing the parties' respective positions, following oral argument and review of the Supplemental pleadings of the parties. Accordingly, the court alternatively finds that NBC has failed to show that the amount sought to be attached is readily ascertainable. Difficult questions exist in ascertaining the amount of the claim. NBC's claims against Focus Media, while clearly substantial in amount, and certainly, not frivolous, nonetheless are not susceptible to a clear-cut application of California's Attachment statute.

Finally, the existing Protective Order is VACATED.

Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 § 1234 [to be codified at 11 U.S.C. § 303]

SEC. 1234. INVOLUNTARY CASES.

(a) AMENDMENTS – Section 303 of title 11, United States Code, is amended –

(1) in subsection (b)(1), by –

(A) inserting 'as to liability or amount' after 'bona fide dispute'; and

(B) striking 'if such claims' and inserting 'if such noncontingent, undisputed claims'; and

(2) in subsection (h)(1), by inserting 'as to liability or amount' before the semicolon at the end.

(b) EFFECTIVE DATE; APPLICATION OF AMENDMENTS – This section and the amendments made by this section shall take effect on the date of the enactment of this Act and shall apply with respect to cases commenced under title 11 of the United States Code before, on, and after such date.

H.R. Rep. No. 109-31, part 1, at 149

Sec. 1234. Involuntary Cases. Section 1234 of the Act amends the Bankruptcy Code's criteria for commencing an involuntary bankruptcy case. Current law renders a creditor ineligible if its claim is contingent as to liability or the subject of a bona fide dispute. This provision amends section 303(b)(1) to specify that a creditor would be ineligible to file an involuntary petition if the creditor's claim was the subject of a bona fide dispute as to liability or amount. It further provides that the claims needed to meet the monetary threshold must be undisputed. The provision makes a conforming revision to section 303(b)(1). Section 1234 becomes effective on the date of enactment of this Act and applies to cases commenced before, on, and after such date.

151 Cong. Rec. E677-78 (daily ed. Apr. 18, 2005)
(Statement of Rep. Royce)

BANKRUPTCY ABUSE PREVENTION AND CONSUMER PROTECTION ACT OF 2005

SPEECH OF
HON. EDWARD R. ROYCE
OF CALIFORNIA
IN THE HOUSE OF REPRESENTATIVES

Thursday, April 14, 2005

Mr. ROYCE, Mr. Speaker, I want to address my remarks to an important provision of S. 256, that is a clarification of Section 303 of the Bankruptcy Code. Section 1234 restates and strengthens Congress' long-standing intent that an involuntary bankruptcy action should not be predicated on disputed claims. Otherwise, opportunistic litigants seeking to gain advantage in contract disputes may improperly employ the leverage of the bankruptcy court.

Because bankruptcy courts should not be used to resolve disputed claims in involuntary cases, the clarification of Section 1234 reemphasizes that a person who disputes the amount of, or liability for, a claim should not be disadvantaged by the stigma and expense of an involuntary bankruptcy proceeding. Put simply, the bankruptcy courts in this nation should now uniformly hold that any claim that is subject to a dispute or litigation, or if it is contested, whether as to the amount of the claim, or as to liability for the claim, that claim cannot be used to commence an involuntary bankruptcy case. This is the bright line that Congress intended to create in 1984 because involuntary bankruptcy carries with it, not only a responsibility, but the

burden on behalf of petitioning creditors to be accurate and certain that their provable claims are qualified by being without dispute as to either liability or amount before commencing an involuntary bankruptcy case. The consequence of bad faith or even sloppy work here is more disastrous than in garden-variety litigation or through the voluntary use of the bankruptcy laws.

It is incomprehensible that an involuntary bankruptcy petition could be based on claims that are inaccurate as to either liability or amount; the injustice that would result from such a filing is so manifest. Despite this manifest injustice of national significance, judges continue to condone the filing of involuntary petitions brought by creditors using disputed claims. For this reason, section 1234 was made a necessary part of this legislation.

There has never been a vote recorded in opposition to this provision because it clearly expresses the unanimous will of Congress; it is the furthest thing from the mind of any Congressman that an involuntary case could be brought on the basis of claims that are disputed. To the contrary, as expressed by this legislation, it has been the will of Congress since 1984 that any claim used to commence an involuntary case must be without dispute.

The bankruptcy courts should not be enjoyed by involuntary petitioning creditors who cannot then prove up claims as to liability or amount. That party should stand in the most accountable legal position. This clarification is necessary because the intent of Congress has been blurred by judicial decisions that go so far as to split disputed claims into "disputed" and "undisputed" parts, or to describe disputes as "potential disputes." These decisions are wrong and the damage they have caused to the

victims of involuntary bankruptcy cases brought using such claims is incalculable. The remedy for such victims rests on an expansive reading of Section 303 (i).

Finally, it is the intent of Congress, as expressed through the unique retroactive application of Section 1234, to require the dismissal of any involuntary petition brought by using disputed claims, including any bankruptcy cases that are pending as a result of the misapplication of Section 303.

MOTION FILED

MAR 2 1 2005

No. 04-1107

IN THE

Supreme Court of the United States

IN RE: FOCUS MEDIA, INC.,
Debtor,

FOCUS MEDIA, INC.,
Petitioner,

vs.

NATIONAL BROADCASTING COMPANY, INC.;
ABC, INC.; PAXSON COMMUNICATIONS, INC.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF OF THE LATINO COALITION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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No.

In The
SUPREME COURT OF THE UNITED STATES

IN RE: FOCUS MEDIA, INC.,
Debtor,

FOCUS MEDIA, INC.
Petitioner,

vs.

NATIONAL BROADCASTING COMPANY, INC.; ABC, INC.; PAXSON COMMUNICATIONS, INC.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MOTION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF

THE AMICI CURIAE

The Latino Coalition is a non-profit, non-partisan national organization based in Washington, D.C., whose mission is to research and develop policies that are relevant to Latino-Americans' overall economic, cultural, and social development. As part of this mission, The Latino Coalition monitors public policy, including that formulated by the judiciary, at the federal, state, and local levels and analyzes and reports to the public about the impact of Federal, State, and local legislation on Latino communities.

MOTION OF THE LATINO COALITION TO FILE AMICUS CURIAE BRIEF

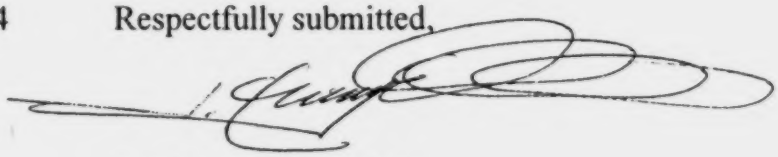
Pursuant to this Court's Rule 37.3(b), The Latino Coalition ("TLC") respectfully moves this Court for leave to file the attached Brief of Amicus Curiae in support of the Petitioner. A letter of consent from the Petitioner's counsel to the filing of this brief has been filed with the Clerk. However, Respondents' counsel has declined to give consent.

TLC's specific interest in this case lies in its unique impact on Latino Americans. Latino Americans are particularly beset by financial challenges and difficulties with creditors and, thus are uniquely affected by any change in the law that makes it easier for creditors to force them into bankruptcy against their wishes.

The Ninth Circuit Court of Appeals' decision held that an involuntary bankruptcy petition may be predicated on claims that are disputed in amount, contrary to the protections in Bankruptcy Code section 303(b). The implications for Latino Americans are dramatic. Disputes with creditors are more likely by virtue of both the socio-economic status of Latino Americans and the concomitant linguistic and cultural barriers in the legal system.

The loss of these protections in the Code makes it more difficult for Latino Americans to comprehend the claims asserted against them by creditors. Likewise, Latino Americans would be hindered, if not prevented, from articulating a clear response to those disputed claims that would otherwise foster an out-of-court resolution.

March 18, 2004 Respectfully submitted,



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QUESTION PRESENTED

1. May a petition for involuntary bankruptcy be based upon a claim, the amount of which is subject to a bona fide dispute?

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INTEREST OF THE *AMICUS CURIAE*

The Ninth Circuit's Opinion holds that an involuntary bankruptcy petition may be predicated on a claim that is subject to a *bona fide* dispute over its amount. This holding is both contrary to the specific language of section 303 of the United States Bankruptcy Code and contrary to the intent of Congress. The lower court's ruling has negative ramifications for Latino Americans. Financial and economic challenges that uniquely impact the Latino American community mean that its members are much more likely to become embroiled in disputes with creditors. This disputes could lead to significantly increased involuntary bankruptcy filings for this segment of the community. Moreover, disputes over amounts are more common for Latino Americans due to existing linguistic and cultural barriers in the legal system that already impede understanding and clear communication.

As discussed in this Amicus Brief, the Ninth Circuit's view is at variance with the Second Circuit Court of Appeals, which has held that a petition for involuntary bankruptcy may not be premised on a claim that is subject to a dispute over its amount. The Second Circuit holding is consistent with Bankruptcy Code section 303 and provides the protections that the Congress intended for alleged debtors, protections that were denied by the Ninth Circuit's Opinion below.

INTRODUCTION[1]

The Ninth Circuit Court of Appeals' Opinion held that an involuntary bankruptcy petition may be based upon a claim that is disputed over its amount, provided only that it appears from the allegations that the statutory threshold for filing an involuntary petition is satisfied. This holding conflicts with Bankruptcy Code section 303, which specifically disqualifies any claim that is the subject of a "*bona fide* dispute" from serving as the basis for an involuntary petition. The legislative history makes clear that Congress intended that an involuntary bankruptcy petition cannot be premised on a claim that is disputed in either liability *or amount.*

Yet the Ninth Circuit ignored the plain language of the statute and its legislative history. It held essentially that the claim on which an involuntary petition effectively can be split into two parts: the disputed and the apparently undisputed and the petition can then proceed without regard to the existence of the dispute. Not only is this holding contrary to law, but it is also bad public policy. Disputed claims should be resolved in civil court, not bankruptcy court. Bankruptcy carries a powerful stigma that the citizens of this Country should not be subjected absent appropriate safeguards. Congress provided the safeguard of closing the bankruptcy courthouse doors to creditors with disputed claims. The Ninth Circuit wants to put the keys to those doors in creditors' hands.

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[1] At the request of The Latino Coalition, counsel for Petitioner assisted in the preparation of this brief.

The Latino Coalition represents a constituency that is uniquely affected by the Ninth Circuit's ruling and respectfully requests that this Court grant certiorari to correct the injustice that occurred below.

ARGUMENT

Under section 303 of the United States Bankruptcy Code, an involuntary bankruptcy petition may not be brought if the claim on which it is based is in *bona fide* dispute. The following quotation from Senator Baucus, the author of the amendment that added the *bona fide* dispute requirement contemplates that a dispute over *either liability or amount* will bar the claim from serving as the basis for an involuntary bankruptcy:

> Under my amendment the original filing of an involuntary bankruptcy petition could not be based on debts that are the subject of a good faith dispute between the debtor and his or her creditors. In the same vein, the granting of an order of relief could not be premised solely on the failure of a debtor to pay debts that were legitimately contested as to liability *or amount*.

130 Congressional Record S7618, June 19, 1984, remarks of Senator Baucus. (Emphasis added.)

The disqualification of disputed claims from involuntary bankruptcy petitions anticipates the potential abuse of the process. Involuntary bankruptcy is a powerful tool in the hands of a creditor, and carries a strong stigma. It interferes with the alleged debtor's credit and ability to transact business in the usual course, even before an order for relief is entered. As such, the potential exists for an

unscrupulous creditor to use the threat of an involuntary bankruptcy to force a debtor to compromise a legitimately disputed debt. To avoid that abuse of the involuntary bankruptcy process, a dispute over either liability or amount should be held to disqualify an involuntary bankruptcy petition. If only a dispute over liability alone qualifies as a *bona fide* dispute, the potential for abuse still exists.

For example, a creditor owed a relatively modest sum could claim that it is owed many times that amount, under threat that if the creditor is not paid, an involuntary bankruptcy petition will be filed. Likewise, a creditor could force payment of a disputed amount by claiming that if the actual amount of the debt is not paid, the creditor will file an involuntary petition seeking several times what is even arguably owed.

Here, the Ninth Circuit Court of Appeals held that a dispute over amount would have to reduce the claim to something below the statutory threshold before the claim would be disqualified. It said that a dispute as to the amount of a claim "is relevant only if it takes the total debt below $10,775." The effect of this holding is that now, contrary to the statutory mandate, a claim effectively can be "split" into two parts: one disputed and one undisputed. If the bankruptcy court finds that the undisputed portion is above the statutory minimum, that part of the claim can support the involuntary petition, regardless of the dispute over the remainder.

Such a result is at odds with Bankruptcy Code section 303, which provides that an involuntary bankruptcy petition must be dismissed if the claim on which it is premised is *disputed*. The statute does not contemplate that a "claim" may be broken apart and separately analyzed to determine

whether the bankruptcy petition is properly brought. Rather, if a dispute exists over the "claim," the petitioners are disqualified.

Nonetheless, a claimant in bankruptcy barred from proceeding because the claim is disputed is not without a remedy. Civil litigation is still available as a means to resolve the dispute and reduce the debt to judgment. Further, requiring such claims to be decided in a normal civil action affords the would-be debtor the protections that the civil justice system guarantees.

The bankruptcy court should not have jurisdiction to decide the outcome of a disputed claim. Such claims have no place in bankruptcy. The Ninth Circuit's holding to the contrary is wrong as a matter of public policy and wrong as a mater of law.

CONCLUSION

Amicus Curiae The Latino Coalition respectfully requests the Court to grant the Petition for Writ of Certiorari.

March 18, 2004.

Respectfully submitted,

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